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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HOMEBUILDERS ASSOCIATION OF CENTRAL ARIZONA, a Non-Profit Arizona Corporation; and MARLBOROUGH DEVELOPMENT CORPORATION, an Arizona Corporation,

Petitioners,

v.

CITY OF SCOTTSDALE, a Municipal Corporation, HERBERT R. DRINKWATER, RENE WENDELL, JAMES D. BRUNER, KATHRYN CAMPANA, MYRON R. DEIBEL, WILLIAM SODERQUIST, and BILL WALTON, Members of the City Council of the City of Scottsdale,

Respondents.

On Petition for Writ of Certiorari to The Supreme Court of Arizona

---

PETITION FOR WRIT OF CERTIORARI

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April 25, 1997

123 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Amendment's heightened rough proportionality standard as articulated in *Dolan v. City of Tigard* applies to development fees assessed against all new building under a local government ordinance.

2. Whether a development fee imposed by a local government ordinance of general application constitutes an uncompensated taking of property in violation of the Fifth Amendment when the development fee confers only remote or speculative benefits on payors of the fee.

3. Whether a court violates the separation of powers doctrine by interpreting an enabling statute inconsistent with its expressed purpose.

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, Rules of the Supreme Court of the United States, Petitioners disclose that they are Arizona corporations without parent or subsidiary companies.

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HOMEBUILDERS ASSOCIATION OF CENTRAL ARIZONA,
a Non-Profit Arizona Corporation; and
MARLBOROUGH DEVELOPMENT CORPORATION,
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v.

CITY OF SCOTTSDALE, a Municipal Corporation,
HERBERT R. DRINKWATER, RENE WENDELL,
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MYRON R. DEIBEL, WILLIAM SODERQUIST,
and BILI WALTON, Members of the City Council
of the City of Scottsdale,

Respondents.

On Petition for Writ of Certiorari
to The Supreme Court of Arizona

PETITION FOR WRIT OF CERTIORARI

Home Builders Association of Central Arizona and Marlborough Development Corporation, hereby petition that a writ of certiorari issue to review the published opinion of the Supreme Court of Arizona filed on January 7, 1997.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona was published at ___ Ariz. ___, 930 P.2d 993 (1997). The text of the opinion is reprinted in the appendix, beginning at App. 1. The supplemental opinion of the Court of Appeals of Arizona, Division One, is published at 183 Ariz. 243, 902 P.2d 1347 (Ariz. App. 1995). The text of the supplemental opinion is reprinted in the appendix, beginning at App. 25. The original opinion of the Court of Appeals of Arizona, Division One, is published at 179 Ariz. 5, 875 P.2d 1310 (Ariz. App. 1993). The text of the original opinion is reprinted in the appendix, beginning at App. 45. The findings of fact and conclusions of law of the Superior Court of the State of Arizona, County of Maricopa, are unreported. The text of the trial court's findings and conclusions is reprinted in the appendix, beginning at App. 84.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The opinion of the Supreme Court of Arizona was filed on January 7, 1997. On March 26, 1997, this Court extended the time in which to file a petition for writ of certiorari to and including April 25, 1997.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Just Compensation Clause of the Fifth Amendment to the Constitution of the United States:

> Nor shall private property be taken for public use, without just compensation.

Section One of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Arizona development fee statute, A.R.S. § 9-463.05 states in pertinent part:

> A. A municipality may assess development fees to offset costs to the municipality associated with providing necessary public services to a development.
>
> B. Development fees assessed by a municipality under this section are subject to the following requirements:
>
> 1. Development fees shall result in a beneficial use to the development.
>
> * * *
>
> 4. The amount of any development fees assessed pursuant to this section must bear a reasonable relationship to the burden imposed upon the municipality to provide

additional necessary public services to the development.

The text of City of Scottsdale Ordinance No. 1940 is reprinted in the appendix, beginning at App. 90.

STATEMENT OF THE CASE

In 1982, the Arizona Legislature passed A.R.S. § 9-463.05 preempting the field of development fees and granting Arizona municipalities the power to impose such fees to offset the cost of providing necessary public services to the paying development. This enabling legislation placed certain restrictions on the exercise of such power, requiring, in pertinent part: (1) that the fee result in a beneficial use to the development; and (2) that the amount of the fee bear a reasonable relationship to the burden imposed on the municipality. The Historical and Statutory Notes of this section state in pertinent part:

The Arizona legislature:

1. Finds and declares that affordable housing is a matter of statewide concern.

2. Recognizes and supports reasonable limitations on government regulation.

3. Intends by this act to prescribe a uniform method by which cities and towns may set development fees.

4. Intends that this act apply uniformly to all cities and towns in this state, notwithstanding any city or town charter, act, ordinance or resolution.

In 1987, under the authority of this enabling legislation, the City of Scottsdale (hereinafter "Scottsdale") enacted Ordinance No. 1940 imposing a Water Resources Development Fee on all new development. For a permit to construct a single family home, the assessed fee was $1,000. The water resource fee was enacted in response to Arizona's Groundwater Management Act of 1980, and was in addition to a pre-existing water system development fee. The groundwater act included a requirement that cities reduce the amount of groundwater use. Following enactment of the groundwater act, Scottsdale purchased Planet Ranch, property with surface water rights located in La Paz and Mojave Counties.

The Petitioners (hereinafter "HBA") are a residential home builder and an association of residential home builders. HBA challenged the development fee ordinance and presented evidence at trial that the ordinance violated the statutory requirements of A.R.S. § 9-463.05. HBA demonstrated that the costs associated with the purchase of Planet Ranch were used as the basis for the assessment of the fee. The evidence at trial established that Scottsdale would not receive any water from Planet Ranch or any of the other proposals presented at trial. The trial court therefore found that the fee failed to result in a beneficial use to the property, and that no reasonable relationship existed between the amount of the fee and the burden on the city. The trial court declared the fee void. (App. 84)

Scottsdale appealed the decision to the Arizona Court of Appeals. In its original opinion of October 26, 1993, the Arizona Court of Appeals reversed the trial court's factual findings on the "beneficial use" requirement, and remanded for determination of "reasonable relationship." Relying on the judicial standard used in reviewing the constitutional limits of municipal policy determinations, the majority held that "courts will acquiesce in the legislative determination of all matters of fact unless it is clearly erroneous, arbitrary and wholly unwarranted." The majority opinion applied this standard and concluded that the Scottsdale fee was not invalid. (App. 45)

The dissenting opinion questioned the review standard applied by the majority. The dissent observed that the issue of whether a beneficial use had accrued to the payor developments was a fact question to be resolved by the courts. The finding on lack of any beneficial use was not a policy decision involving questions for legislative determination. The dissent concluded that because the trial court's findings on this issue were supported by substantial evidence, they were not clearly erroneous and should have been upheld on appeal. (App. 71)

HBA petitioned the Supreme Court of Arizona to review the court of appeals' decision. On July 8, 1994, the Arizona Supreme Court granted review and remanded to the court of appeals to consider its original opinion in light of this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The court of appeals determined on remand this Court's analysis in *Dolan* did not apply to the instant case. The supplemental opinion distinguishes *Dolan* on the basis of the amount of staff-level discretion allowed in that case under the Tigard city ordinance. While conceding that *Dolan* may apply to development fees, the court of appeals held that a

Dolan analysis is implicated only when an administrator or commission exacts permit conditions with little or no legislative guidance. (App. 25)

The supplemental dissenting opinion points out that *Dolan* rejected as constitutionally insufficient a municipality's conclusory determination of the connection between permit conditions imposed and proposed impact of development. The dissent noted in this case that any purported determination on the existence of a beneficial use was likewise conclusory and thus insufficient to meet *Dolan's* "rough proportionality" test. The dissent restated its original conclusion that the trial court's factual findings were not clearly erroneous and should be upheld on appeal. (App. 39)

Following HBA's second petition, the Arizona Supreme Court again accepted review of this case on September 28, 1995. The court requested supplemental briefing on the application of *Dolan's* proportionality test. On January 7, 1997, the court issued its opinion holding that to show the required relationship between a fee and a beneficial use, municipalities need only demonstrate a good faith attempt to use development fees to provide services within a reasonable time. The court attempted to distinguish *Dolan*, holding that *Dolan* was not implicated in cases of generally applicable or legislatively imposed development fees.

The court held that Scottsdale's decision to adopt the fee was entitled to presumptive validity and was reviewable under a deferential "rational relation" standard. (App. 1) The court's opinion presumed in a conclusory fashion that because Scottsdale demonstrated a need for new water, that "the fee will be used to acquire new water supplies." (App. 10) The court does not cite to any support in the record for such

assertion, nor does it hold the trial court's findings on the same issue clearly erroneous. Further, the court does not explain how the unproven new water sources equal a beneficial use to payor's property.

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court's decision in this case represents one of a rapidly expanding number of conflicting judicial opinions on the scope of the Fifth Amendment's rough proportionality requirement. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). This conflict among the state and federal courts considering the issue compels the need for this Court to grant certiorari and provide direction on the proper application of *Dolan* to varying types of development exactions. The Arizona Supreme Court has erroneously decided an important federal issue by limiting the scope of *Dolan's* rough proportionality inquiry to exclude development fees of general application. The instant case presents a timely opportunity for this Court to provide direction on an important constitutional issue which remains the unresolved subject of conflicting decisions in the lower courts.

I. This Case Raises Important Federal Issues Which Have Been Incorrectly Decided Below.

Although the trial court's decision in this matter rested upon an interpretation of an Arizona statute, subsequent review by the Arizona appellate courts has specifically adjudicated the scope of *Dolan's* rough proportionality requirement. The Arizona Supreme Court specifically addressed the validity of Scottsdale's fee "in light of the takings law of the United States." (App. 4) In making its determination that *Dolan's* rough proportionality standard is

inapplicable, the Arizona Supreme Court has inappropriately interpreted the United States Constitution. In so doing, the Arizona court is subject to the final authority of this Court. *Arizona v. Evans*, ___ U.S. ___, 115 S. Ct. 1185 (1995).

In *Evans*, this Court considered whether jurisdiction was proper under 28 U.S.C. § 1257. The Court determined that the Arizona Supreme Court in that case had in fact passed upon a Fourth Amendment issue in determining the applicable scope of the exclusionary rule. This Court's opinion acknowledged that the exclusionary rule and its proper application was a judicially created remedy designed for the implementation of Fourth Amendment principals. *Id.* at 1188.

In a similar fashion, *Dolan's* rough proportionality requirement is an implementation of Fifth Amendment property protections. The Arizona Supreme Court's improper application of the rough proportionality test is therefore subject to review by this Court. A grant of certiorari is appropriate when the lower court has improperly applied the holding of a prior Supreme Court decision. *Bullington v. Missouri*, 451 U.S. 430 (1981); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). Likewise, a grant of certiorari is appropriate when the lower court is under a misapprehension regarding the controlling law. *Florida v. Rodriguez*, 469 U.S. 1 (1984).

As noted in the dissent in *Parking Association of Georgia, Inc. v. City of Atlanta*, ___ U.S.___, 115 S. Ct.2268 (1995), and by numerous legal commentators,[1] the various

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[1] *See, e.g.*, Robert H. Freilich, *Thou Shalt Not Take Title Withouth Adequate Planning: The Takings Equation After Dolan v. City of Tigard*, 27 Urb. Lawyer 187 (1995).

courts dealing with the scope of the rough proportionality test have reached conflicting results. The instant case represents an opportunity for this Court to clarify the scope of Fifth Amendment protections as they pertain to legislatively imposed development fees of general application. Given the confines of local government financing, development fees as a revenue raising device are subject to ever expanding use by local governments. Julian C. Juergensmeyer & Robert M. Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St. U.L. Rev. 415 (1981). The increased use of such fees will continue to result in the type of conflicting decisions now seen among the various courts considering the issue.

II. No Resolution Of The Conflicting Lower Court Opinions Is Possible Without A Decision From This Court.

In *Ehrlich v. City of Culver City*, ___ U.S. ___, 114 S. Ct. 2371 (1994), this Court vacated and remanded to the California Court of Appeals. That case involved the application of a municipal development fee. After review, the Supreme Court of California held that *Dolan's* rough proportionality requirement did in fact apply in cases beyond a dedication of land or physical occupation. The California Supreme Court characterized the fee there involved as an adjudicatively imposed exaction distinguished from an exaction of general application. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, ___, 911 P.2d 429, 447 (1996).

In the instant case, the Arizona Supreme Court appeared to follow the reasoning of the California Supreme Court as expressed in *Ehrlich*. Both courts apparently concede that the *Dolan* analysis may apply in the case of a fee, though perhaps

only if the fee is the subject of regulatory leveraging against an individual land owner bargaining for approval on use of his land. The Arizona Supreme Court held that the risk of such leveraging does not exist if the exaction is embodied in a generally applicable legislative decision. The courts' reliance on this point, however, is misplaced. In *Dolan*, the City of Tigard's Community Development Code imposed building restrictions and dedication requirements for bicycle paths. The Tigard Planning Commission had agreed to grant the permit application subject to those conditions imposed by the Community Development Code. *Dolan* was not therefore a case involving the type of regulatory leveraging against an individual property owner as described by the Arizona Supreme Court. The development exactions in *Dolan* were in fact embodied in a generally applicable legislative decision.

The Arizona court is also incorrect to the extent that it suggests that development exactions imposed on multiple property owners are inherently legislative decisions. There is no clear authority on what sort of local government action is legislative and what is judicial or administrative. Note, *Dolan v. City of Tigard*: A Heightened Scrutiny of the Takings Clause of the Fifth Amendment, 32 Hous. L. Rev. 1153, 1175 (1995). The issue faced by all courts is whether the increased scrutiny and rough proportionality requirements apply to all development exactions or only a narrowly drawn class of such exactions. It remains unclear why an ordinance of general application to all new development within a governmental boundary should be a factor in determining the existence of a taking, or why the more closely tailored protections of rough proportionality should be applied in the case of a single property exaction but not in the case of an exaction imposed on multiple property owners.

Conflicting opinions of the various courts considering this issue have attempted to draw a distinction between exactions applied to a single property owner and those applied generally, as well as between dedication exactions and fee exactions. Development exactions consisting of fees applied generally have been relegated by many courts to the status of mere regulatory takings, subject therefore to a lesser, rational basis standard of review. *See Id.* Such fee cases, however, differ from a typical regulatory taking in that the fee is a development exaction imposed against specific property in exchange for the granting of a building permit, a discretionary governmental benefit. Without such a permit, the owner is unable to make use of the property. A potential regulatory taking generally arises out of a law of general application which incidentally affects certain property interests.

The Arizona Supreme Court found that a dedication requirement is a more invasive form of land regulation than a fee. The Arizona court characterizes a fee as a "more benign form of regulation." The validity of this finding is undermined by reference to the facts in *Dolan*. The Tigard Community Development Code limited the coverage of a particular building site to eighty-five percent of all of an owner's property, effectively maintaining the one hundred year flood plain portion of the property as a greenway. The dedication requirement imposed nearly equaled fifteen percent of Mrs. Dolan's property. Because of the nature of the property as well as the restrictions of the Community Development Code, the portion of land subject to the dedication requirement was unavailable for development. Thus, only the property owner's right to exclude was at issue in considering the protections of the Fifth Amendment. It is

difficult to see how the required dedication of unusable land is any more an unconstitutional condition than requiring payment of a fee as a like condition precedent to development.

The *Dolan* decision rests on an analysis of numerous state development fee and exaction cases. This Court included an overview of the dual rational nexus requirements applied by a majority of state courts. The Court notes its previous adoption of the "essential nexus" test as set forth in *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which was likewise based on a number of state nexus cases. After reviewing the state court decisions, the Court determined that the "reasonable relationship" test adopted in the majority of jurisdictions was more or less equivalent to the federal constitutional requirement. Apparently concerned with the confusing "reasonable relationship" language, the Court adopted a "rough proportionality" test. None of the state nexus cases relied on by the Court indicate any of the factors upon which the Arizona Supreme Court distinguished the *Dolan* decision. Of the five cases cited by the Court in support of the rough proportionality test, all concern a broad based municipal ordinance of general application. *Simpson v. North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980); *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984); *Call v. West Jordan*, 606 P.2d 217 (Utah 1979). Four of the five cases concern a dedication or in lieu fee ordinance. The Court in *Dolan* clearly intended to clarify the "rational nexus" review historically applied to development fees and other permit exactions, without limiting such review to ordinances permitting administrative discretion or involving a single property owner.

Similar arguments raised in an attempt to distinguish or limit the scope of the *Dolan* opinion have been rejected. *Schultz v. City of Grants Pass*, 131 Or. App. 220, 884 P.2d 569 (1994); *J.C. Reeves Corp. v. Clackamas County*, 131 Or. App. 615, 887 P.2d 360 (1994). In *J.C. Reeves Corp.*, the county argued that *Dolan* was inapplicable because the permit conditions imposed on the property owner were required by its zoning ordinance. There the court held that:

> The character of the [condition] remains the type that is subject to the analysis in *Dolan*, whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters.

887 P.2d at 365 (citation omitted). In the instant case, payment of the development fee was a condition precedent to the issuance of any building permit. Clearly, the nature of the permit exaction in this case implicates the *Dolan* analysis.

In the instant case, the factual findings below established that no beneficial use accrued to property owned by the payors of the fee and that any potential benefit was remote in time and speculative in nature. Judicial inquiry regarding the benefit accruing to fee payors is the same means-ends inquiry embodied in the proportionality required between the impact of proposed development and a property dedication exaction. The rough proportionality inquiry applies to the required fit between an exaction condition and the proposed impact of development, irrespective of whether that impact is expressed in terms of benefit or burden.

III. The Holding of the Arizona Supreme Court Violates the Separation of Powers Doctrine.

The restrictions on development fees set out by the Arizona legislature in A.R.S. § 9-463.05 were based on judicially created formulations relied upon by the various state jurisdictions. In its original opinion in this case, the Arizona Court of Appeals found that the legislature had adopted the standards espoused by the dual rational nexus test. (App. 45) Municipalities and other local governments have only those powers which are delegated by the constitution and laws of the state. *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 439 P.2d 190 (1968). The power of a municipality is to be strictly construed and every reasonable limitation on that grant of power should be resolved against it. *Phoenix Title & Trust Co. v. Burns*, 96 Ariz. 332, 395 P.2d 532 (1964). A.R.S. § 9-463.05 is an enabling act which both grants and limits the power of local government to enact development fees. Municipalities must comply with those restrictions mandated by the legislature.

Although the above enabling act places specific restrictions on municipal development fees, the opinion of the Supreme Court of Arizona ignores and essentially emasculates those restrictions. While the statute requires that a development fee must result in a beneficial use to the payor development, the Arizona Supreme Court held instead that a city need only indicate a good faith intent to use development fees to provide additional public services within a reasonable time. In so holding, the court has supplanted the restrictions placed on cities by the Arizona legislature. The holding thus amounts to nothing more than judicial policy making in contradiction of the expressed will of the legislature. Such

judicial conduct violates the constitutional separation of powers doctrine.

It is the limited role of the Arizona Supreme Court to interpret and uphold the particular limits on local government identified and expressed in the enabling legislation. To hold otherwise places the judiciary in an improper role inconsistent with the constitutionally imposed separation of powers. This case is analogous to the improper creation of federal common law in the absence of, or in opposition to, congressional mandate on the particular subject. *Musson Theatrical, Inc. v. Federal Express Corporation*, 89 F.3d 1244 (6th Cir. 1996).

CONCLUSION

On the record, Scottsdale cannot show rough proportionality between the fee and the beneficial use accruing to the development, and cannot show rough proportionality between the amount of the fee and the burden imposed on Scottsdale to provide water. Given the importance of the scope of Fifth Amendment protection, applied to the states through the Fourteenth Amendment, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 25, 1997

APPENDIX

APPENDIX

HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, a non-profit Arizona corporation; for and on behalf of all similarly situated; Grupe Development Co. Inc., an Arizona Corporation; Knoell Bros. Construction, Inc., a Arizona corporation; Marlborough Development Corporation, an Arizona corporation,
Plaintiffs-Appellees,
v.
CITY OF SCOTTSDALE, a municipal corporation; Herbert R. Drinkwater, Rene Wendell, James D. Bruner, Kathryn Campana, Myron R. Deibel, William Soderquist, and Bill Walton, members of the City Council of the City of Scottsdale,
Defendants-Appellants.

Supreme Court of Arizona,
En Banc.

Jan. 7, 1997.

Developers brought action challenging city's water resource development fee upon new developments as violating state law. The Superior Court, Maricopa County, No. CV-87-31929, William P. Sargeant, III, J., entered judgment for developers, and city appealed. The Court of Appeals, 179 Ariz. 5, 875 P.2d 1310, reversed and

remanded in part. Granting review, the Supreme Court remanded matter with directions to reconsider in light of recent United States Supreme Court opinion. On remand, the Court of Appeals, 183 Ariz. 243, 902 P.2d 1347, determined that ruling did not affect prior opinion in matter. On petition for discretionary review, the Supreme Court, Charles E. Ares, J. pro tem., held that: (1) development fee conferred sufficient benefit on potential developments, as required by enabling statute, and (2) benefit did not have to be based on concrete and immediate plan.

Superior Court reversed and remanded with direction.

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Shelley & Bethea by J. LaMar Shelley, Mesa, for Amicus Curiae League of Arizona Cities and Towns.

OPINION

CHARLES E. ARES, Judge Pro Tem.

Driven by the Groundwater Management Act of 1980 to drastically reduce its dependence on underground water, the City of Scottsdale imposed a water resources development fee on all new realty developments. The Home Builders Association of Central Arizona (HBA), some of whose members paid the fee under protest, challenged in superior court the fee's validity under Arizona's enabling act, A.R.S. § 9-463.05. The trial court declared the fee invalid on the ground that Scottsdale's plans to acquire new water were too speculative to confer a beneficial use on the developer, as required by the statute.

The court of appeals reversed that decision because the trial judge had failed to accord proper deference to the Scottsdale city council's legislative decision to adopt the fee. The court held the development fee was entitled to a presumption of validity and that the HBA had not proven that the city's decision was arbitrary. *Home Builders Ass'n v. City of Scottsdale*, 179 Ariz. 5, 13, 875 P.2d 1310, 1318 (App.1993) (*Home Builders I*).

This court granted review but remanded the case for reconsideration in light of the recent United States Supreme Court decision in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). On reconsideration, the court of appeals reaffirmed its initial decision, holding that *Dolan* did not dictate a different result. *Home Builders Ass'n v. City of Scottsdale*, 183 Ariz. 243, 902 P.2d 1347 (App.1995) (*Home Builders II*).

The case is now before us on petition for review. We must determine the validity of the city's development fee under A.R.S. § 9-463.05 and in light of the takings law of the United States. We hold Scottsdale's fee valid.

I. FACTUAL BACKGROUND OF THE SCOTTSDALE FEE

The Groundwater Management Act of 1980, A.R.S. §§ 45-401 to 704 (1987 & Supp.), requires municipalities to reduce their dependence on groundwater by achieving safe yield--a balance between the amount of underground water pumped out of the aquifers and the amount naturally and artificially recharged. Because Scottsdale has a contract to receive surface water from the Central Arizona Project (CAP), it is statutorily deemed to have an assured water supply; however, by the year 2001 the city must demonstrate to the state director of water resources that in fact it has sufficient water supplies to meet its developing

needs for 100 years. (This deadline has now been moved to January 1, 1998. A.R.S. § 45-576(E).) Before adopting the development fee at issue here, the city undertook a detailed study of the water resources needed to comply with the Groundwater Management Act. The study, "Water Resources Plan 1985," concluded that Scottsdale clearly lacks sufficient water for the future. It also found that Scottsdale would need to raise capital to acquire new supplies of surface water and to construct a system to transport that water.

Anticipating the need for more water, Scottsdale had already purchased Planet Ranch and its surface water rights in the Bill Williams River in La Paz and Mohave Counties. City planners proposed that water from Planet Ranch be brought to the city through a canal system tied to the CAP. Planet Ranch cost more than $11 million, and the cost of carrying the water to the CAP aqueduct was estimated at $18 million more. In addition, the water resources plan proposed *995 the city increase its recharge capacity by constructing Water Factory 21, an advanced effluent treatment plant that would produce potable water. Other sources of surface water such as the purchase or lease of water rights from various native American tribes were also outlined in the plan.

To assist in accumulating capital, the plan proposed the adoption of a development fee for all new real estate

developments. The city council adopted Ordinance No.1940, imposing a fee of $1,000 per single family residence, $600 per apartment unit, and $2,000 per acre foot of estimated water consumption for other new uses. The fees are imposed as a condition on the approval of new developments.

II. STATUTORY VALIDITY OF SCOTTSDALE FEE

A. Trial Court Findings

HBA challenged the Scottsdale fee for failing to meet the requirements of the enabling statute:

> A.R.S. § 9-463.05. Development fees; imposition by cities and towns
>
> A. A municipality may assess development fees to offset costs to the municipality associated with providing necessary public services to a development.
>
> B. Development fees assessed by a municipality under this section are subject to the following requirements:
>
> 1. Development fees shall result in a beneficial use to the development.

2. Monies received from development fees assessed pursuant to this section shall be placed in a separate fund and accounted for separately and may only be used for the purposes authorized by this section. Interest earned on monies in the separate fund shall be credited to the fund.

3. The schedule for payment of fees shall be provided by the municipality. The municipality shall provide a credit toward the payment of a development fee for the required dedication of public sites and improvements provided by the developer for which that development fee is assessed. The developer of residential dwelling units shall be required to pay development fees when construction permits for the dwelling units are issued.

4. The amount of any development fees assessed pursuant to this section must bear a reasonable relationship to the burden imposed upon the municipality to provide additional necessary public services to the development. The municipality, in determining the extent of the burden imposed by the development, shall consider, among other things, the contribution made or to be made in the future in cash by taxes, fees or assessments by the property owner towards the capital costs of the necessary public service covered by the development fee.

> 5. If development fees are assessed by a municipality, such fees shall be assessed in a non-discriminatory manner.
>
> (Emphasis added.)

HBA's principal witness was Leonard Dueker, the director of the city's Water Resources Department and author of "Water Resources Plan 1985," who testified in detail about the city's need for new water and its plans to obtain it. Taken as a whole, the evidence overwhelmingly supported the city's decision that it needed more water. The trial court found HBA failed to prove Scottsdale had an adequate water supply for the foreseeable future. The court also found the city reasonably could have concluded that it needed to acquire new water resources. Findings of Fact Nos. 10 and 11. The trial court held, as a matter of law, the enactment of the development fee in this case was a legislative decision within the discretion of the city council. Conclusion of Law No. 4. Despite that conclusion, the court held any benefit to the developers who were assessed the fee was too remote in time and speculative in nature to satisfy the benefit criterion of § 9-463.05(B)(1). Finding of Fact No. 13, Conclusion of Law No. 6. The record discloses that the trial judge's conclusion in this respect was based on Dueker's testimony that it was possible Planet Ranch water might never be brought to Scottsdale if an alternative source of water were developed. At the time of trial, Scottsdale was exploring

the possibility of obtaining surface water *996 from the San Carlos Apache Tribe; in addition, no specific plans for building the canal system to carry Planet Ranch water to Scottsdale had yet been developed. Testimony indicated that if San Carlos water could be obtained, Scottsdale might try to sell Planet Ranch to the U.S. Fish and Wildlife Service or the Bureau of Land Management.

B. Presumption of Validity of Legislative Actions

[1,2] We agree with the court of appeals that the trial judge committed error. The adoption of Ordinance No.1940 was a legislative act that came to the court cloaked with a presumption of validity. *City of Phoenix v. Fehlner*, 90 Ariz. 13, 17, 363 P.2d 607, 609 (1961). Land use regulations of general application will be overturned by the courts only if a challenger shows the restrictions to be arbitrary and without a rational relation to a legitimate state interest. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926); *Cardon Oil Co. v. City of Phoenix*, 122 Ariz. 102, 104, 593 P.2d 656, 658 (1979); *see also Edwards v. State Bd. of Barber Examiners*, 72 Ariz. 108, 112-13, 231 P.2d 450, 452 (1951). Development or impact fees are presumed valid as exercises by legislative bodies of the power to regulate land use.

[3] It is important to recognize just what the presumption means. It means, first, that the factual underpinning for the city council's decision, i.e., that the city needed more water, must stand unless shown to be without factual support. Clearly, HBA failed to make that showing. Second, the presumption also means that the wisdom of Scottsdale's choice of methods of meeting its water needs is a legislative, not a judicial, question. The purchase of Planet Ranch may not have been, as HBA has asserted, a wise one, but that question is not for this or any other court. *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 556-57, 637 P.2d 1053, 1059-60 (1981); *see also Rochlin v. State*, 112 Ariz. 171, 174, 540 P.2d 643, 646 (1975). The only issue finally before the trial court, aside possibly from the reasonableness of the fee, was whether the fee conferred a benefit as required by the statute.

We have difficulty understanding this question to be an open one of fact. Scottsdale needs more water. If it does not get it before the deadline for reaching safe yield, it must stop approving new development. Both state zoning laws and the Groundwater Code prohibit the approval of a subdivision plat unless it is supported by a certificate of an assured water supply. See A.R.S. §§ 9-463.05(I), 45-576(B). The fee will be used to acquire new water supplies, and the city will be able to move toward its goal of demonstrating an assured 100-year water supply.

Developers who pay the fee and thus contribute to the capital needed for water surely will receive a benefit from the city's ability to approve new developments. Without the assurance of a water supply, developers would be unable to develop and market their land.

C. Concreteness of Benefit Conferred

[4] The real fault with Scottsdale's fee, as found by the trial court, was not its failure to confer a benefit in fact but that the means chosen by the city were not sufficiently concrete and immediate to satisfy the requirement of § 9-463.05.

1. Deference to Legislative Decisions

[5] This was error in two respects. First, it led the court into the realm of legislative choices. When the court required assurance that whatever plans Scottsdale had developed at the time of adopting the fee would actually be followed, it undertook to test the wisdom and practicability of the city's legislative decisions. There was no evidence that the plans were a sham or inherently improbable, just that they might, in a search for economy, be changed. Scottsdale was dealing with a complex, ever-changing problem in predicting future growth and water needs. The city's decision to impose a development fee to be used to acquire the water needed to meet future needs was based on

substantial evidence. Once plausible plans for acquiring that water had been adopted, whether to persist in those plans over the several years the project would require is surely a legislative, not judicial, decision. Courts must accord municipalities considerable deference and upset their legislative *997 decisions only if they are shown to be arbitrary and without factual justification.

2. Beneficial Use/Benefit Conferred

Second, the trial court's finding that the Scottsdale plan was too amorphous and speculative rested on an unarticulated but erroneous construction of § 9-463.05. The trial court implied that the statute requires plans more mature and "locked in" than Scottsdale's were. Such a reading of the statute was incorrect.

[6] Where the language of a statute is clear and unambiguous, courts are not warranted in reading into the law words the legislature did not choose to include. *Mid Kansas Fed. Savings & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991). The plain language of § 9-463.05 contains no such requirement as the trial judge imposed here. It simply requires that the fee confer a beneficial use on the developer.

3. Development Fees

A development or impact fee is not a special assessment levied on a landowner whose property is immediately benefitted by access to such public improvements as sidewalks, sewers, and water works. In those cases, the legislature has required "preliminary plans that show the location and the type and character of the proposed improvements and estimates of the cost and expenses," as a basis for calculating the precise amount of the assessment. A.R.S. § 48-577; *see also Home Builders Ass'n v. Riddel,* 109 Ariz. 404, 407, 510 P.2d 376, 379 (1973). With this more restrictive legislation already in place, the legislature adopted the development fee statute without such limiting language. The omission seems to us significant. Interestingly, when the proposal to authorize development fees was first introduced in the Arizona Senate as Senate Bill 1197, it required a development fee to confer a direct benefit on the developer. That term was dropped from the bill before final passage. Quite clearly, the legislature did not intend to require development fees to rest on such concrete plans as are mandated for special assessments.

We also believe that a requirement such as the one the trial judge read into the statute would be incompatible with the nature of the development fee and would thwart the apparent purpose of the legislature. Development or

impact fees are designed to assist in raising the capital necessary to meet needs that surely will arise in the foreseeable future but whose precise details may not at the outset be quite clear. To require more fixed and certain plans would make it difficult, if not impossible, to prepare in advance for the consequences of continued growth.

D. Determining the Benefit

Nevertheless, § 9-463.05 requires that the fee result in a benefit to the developer, and because the term is not self-defining, courts must necessarily pour content into it. That content must be derived, however, from the legislature's intent, as faithfully as the courts can determine it. *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991). State courts had developed a fairly large body of law regarding the validity of development or impact fees by the time § 9-463.05 was adopted. *See generally* Brian W. Blaesser & Christine M. Kutopp, *Impact Fees: The "Second Generation,"* 38 WASH. U.J. URB. & CONTEMP. L. 55 (1990); Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415 (1981). Read together, the state cases have produced a widely accepted standard for assessing the validity of these fees. *See, e.g., Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802

(Tex.1984); *Jordan v. Village of Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965). That standard requires first that the exaction imposed on the developer be factually related to the need for public services created by the proposed development. Second, the nature and extent of the exaction must bear a reasonable relationship to that portion of the public burden created by the proposed development. *Jordan*, 137 N.W.2d at 447-49. This test, only slightly modified, was adopted by the Supreme Court as the standard required by the Takings Clause of the Fifth *998 Amendment. *Dolan*, 512 U.S. at ____, 114 S.Ct. at 2319 (1994).

1. Statutory Development Fees

Under the Arizona statute, a development fee can only be imposed to help pay the costs of providing public services to a proposed development. The fees are rationally related to a need created by the development; when they are spent to provide the needed services, the developer benefits. Our legislature adopted § 9-463.05 in light of the law developed by state courts. As the court of appeals noted in this case, the statute tracks the elements of the predominant state standard. *Home Builders I*, 179 Ariz. at 9, 875 P.2d at 1314. The benefit criterion of § 9-463.05 is explicit and requires the fee to bear a reasonable relationship "to the community burden."

An examination of cases applying what is sometimes called the dual nexus test reveals that development fees have been upheld where they are imposed to finance public improvements the need for which will arise in the foreseeable, though not immediate, future. *Jordan,* 137 N.W.2d at 446-47 (schools, parks and recreation needs); *Collis*, 310 Minn. 5, 246 N.W.2d 19 (parks and playgrounds); *Call v. City of West Jordan,* 606 P.2d 217 (Utah 1979) (flood control, parks and recreational facilities).

In none of these cases was the benefit to the developer limited to concrete plans for specific developments. In *Call*, for example, the Utah Supreme Court dealt with a municipal requirement that subdividers dedicate seven percent of each subdivision, or its cash equivalent, for flood control, parks, and recreation facilities. Even though the relevant statute permitted the fees to be deposited in the general fund and did not require their expenditure to benefit the affected subdivision alone, the court upheld the exaction because the flexibility required for planning for the expansion of a city militated against more stringent controls on the city's discretion in using the funds. The court assumed that the funds, as a public trust, would be used for the purposes for which the fees were imposed, but it declined to read into the statute greater limitations than the legislature had expressed. *Call,* 606 P.2d at 220.

There is nothing in the history of development fees in state courts to suggest that our legislature intended, by its use of the term "beneficial use," to require the benefit to be based on "locked in" or unchangeable plans. Scottsdale is faced with a long term, complex series of projects designed to meet the requirements of the Groundwater Management Act. We would be reluctant to deprive the city of the flexibility needed to deal with these projects unless the legislature made it clear that it intended no such flexibility. Given the plain language of § 9-463.05, we hold it has not done so.

2. Segregation of Fees

The trial judge may have been concerned that a broad reading of the benefit criterion might tempt a city to use the development fee as an unequal tax for the benefit of its general treasury. The very terms of the statute guard against that possibility. They require the fees to be segregated and used only for the purpose for which they were imposed. § 9-463.05(B)(2). We are sensitive to the need to ensure that development fees are not used to impose on developers a burden all the taxpayers of a city should bear equally. The value of land a developer seeks to develop will be enhanced by the acquisition of water that is essential to new development. The developer thus receives a special benefit in new public services, and § 9-463.05 ensures that he will pay his fair share of its

capital cost. *See generally Hollywood, Inc. v. Broward County*, 431 So.2d 606 (Fla.App.1983).

We hold that § 9-463.05 requires that when a municipality, in its legislative discretion, decides that new developments will require additional public services, it need only develop such plans as will indicate a good faith intent to use development fees to provide those services within a reasonable time. It is clear that Scottsdale's fee meets this standard.

III. REASONABLE RELATIONSHIP

[7] Having found that the trial court erred as to the benefit, the court of appeals *999 remanded the case for a determination whether the fee bore a reasonable relationship to the burden placed on the city. After careful consideration of the record, we conclude that the reasonableness of the fee was not in issue before the trial court and that remand is unwarranted.

HBA had the burden of showing that Scottsdale's fee bore no reasonable relationship to the public burden created by the proposed development. The only evidence it offered on this question came in Dueker's testimony about the formula by which the fee was calculated and the data on which the fee rested. *See* Exhibit 33, "Water Resources Plan 1985"; Testimony of Leonard Dueker, Reporter's Transcript

(R.T.), Sept. 30, 1991, at 84. Using the costs of various alternatives, the city water staff calculated that the approximate capital cost of acquiring and bringing an acre foot of new water to Scottsdale was between $2,000 and $2,500. Historical data showed that a single family dwelling in Scottsdale uses about one-half an acre foot per year and that apartments use about three-tenths of an acre foot per year. The development fee was therefore set at $1,000 for single family dwellings, $600 per unit for apartment dwellings and $2,000 per estimated acre foot of consumption by other uses. HBA did not offer any other evidence on the reasonableness of the fee or actually challenge the amount of the fee. Instead, its attack was simply that Scottsdale's plans were too amorphous. Moreover, before the end of the trial, the judge indicated that he had no concern with the reasonableness issue. He specifically ruled that "the two issues to be determined by trial are 1) the future need for water supply and 2) benefit to the developer." Minute Entry, Oct. 2, 1991. Before the city rested, its counsel raised the question whether it should call an economist to testify to the reasonableness of the fee. The judge made it quite clear that he viewed such testimony as irrelevant to any issue then before him. Counsel for HBA, in somewhat elliptical terms, agreed. As a result, Scottsdale rested without offering such evidence. R.T., Oct. 3, 1991, at 44-47. Although it is true the judge later concluded the Scottsdale fee "is excessive on new development," it is apparent this conclusion flowed from

his erroneous finding that the fee conferred no benefit on developers. See Conclusion of Law No. 9. In his view, any fee that conferred no benefit would, by definition, be excessive.

Finally, at oral argument, counsel for HBA assured this court that the amount of the fee was not in issue. Under these circumstances, we see no justification for remanding for further consideration.

IV. IMPACT OF DOLAN

This case was tried as though the only issue involved was whether the fee met statutory requirements. The court of appeals held that it did. On remand after the Supreme Court's decision in *Dolan,* the court concluded that *Dolan* did not dictate a different result. *Home Builders II*, 183 Ariz. 243, 902 P.2d 1347. We agree, but our reasoning is somewhat different.

The Supreme Court, in *Dolan*, dealt with an individually tailored demand that the landowner dedicate a certain portion of her property to the city for flood control and a pedestrian/bike path as a condition of approving a building permit. The Court granted certiorari to determine "the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." *Dolan,* 512 U.S. at _____, 114

S.Ct. at 2312. Adopting the predominant test developed by the state courts, the Supreme Court held that the exaction must bear a roughly proportional relationship to the community burden created by the proposed development. "Roughly proportional" is actually a term substituted for "reasonable relationship" to avoid confusion with "rational basis" as a standard of scrutiny. *Id.* at ____, 114 S.Ct. at 2319. The Court also held that in the case of an adjudicative decision demanding dedication of particular property, as distinguished from a legislative decision, the burden shifts to the city to justify its exaction. *Id.* at ____ n. 8, 114 S.Ct. at 2320 n. 8.

We agree with the court of appeals that *Dolan* is inapplicable to this case for two reasons. In light of our holding that the reasonableness of the amount of the Scottsdale ***1000** fee was not raised in the trial court, whether that fee is roughly proportional to the burden imposed on the community was likewise not in question. HBA did not argue that there was no reasonable relationship between the amount of the fee and the community burden as required by the statute. There was, therefore, no occasion to apply the *Dolan* test in this case.

Even if the issue of reasonableness had been before the trial court, we agree with the court of appeals that *Dolan* is distinguishable. In *Dolan,* the Chief Justice was careful to point out that the case involved a city's adjudicative

decision to impose a condition tailored to the particular circumstances of an individual case. *Id.* Because the Scottsdale case involves a generally applicable *legislative* decision by the city, the court of appeals thought *Dolan* did not apply. We agree, though the question has not been settled by the Supreme Court. *See Parking Ass'n v. City of Atlanta,* 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. denied,* ___ U.S. ____, ____, 115 S.Ct. 2268, 2269, 132 L.Ed.2d 273 (1995) (Thomas, J., dissenting). We note, however, that there may be good reason to distinguish the *Dolan* adjudicative decision from the Scottsdale legislative one. *Ehrlich v. City of Culver City,* 12 Cal.4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429 (1996), *cert. denied,* ___ U.S. ____, 117 S.Ct. 299, 136 L.Ed.2d 218 (1996), dramatically illustrates the differences between the two exactions. In *Ehrlich,* the city had imposed an individually tailored $280,000 mitigation fee as a condition of approving a rezoning request. On remand from the United States Supreme Court for reconsideration in light of *Dolan,* the California Supreme Court held the record insufficient to show that the fee was roughly proportional to the public burden of replacing recreational facilities that would be lost as a result of rezoning Ehrlich's property. The California court suggested that the *Dolan* analysis applied to cases of regulatory leveraging that occur when the landowner must bargain for approval of a particular use of its land. *Id.* 50 Cal.Rptr.2d at 251, 911 P.2d at 438. The risk of that sort

of leveraging does not exist when the exaction is embodied in a generally applicable legislative decision.

Dolan may also be distinguished from our case on another ground. There, the city demanded that Mrs. Dolan cede a part of her property to the city, a particularly invasive form of land regulation that the court believed justified increased judicial protection for the landowner. Here, Scottsdale seeks to impose a fee, a considerably more benign form of regulation. *See Commercial Builders v. Sacramento,* 941 F.2d 872 (9th Cir.1991).

The Supreme Court's opinions in *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan* have occasioned a great deal of speculation whether ultimately the Court will hold that the Takings Clause demands a higher degree of scrutiny than has traditionally been applied in land regulation cases. *See* Jonathan M. Block, *Limiting the Use of Heightened Scrutiny to Land-Use Exactions,* 71 N.Y.U. L. REV. 1021, 1024 n.154 (1996). Nothing in the Court's opinions requires us to plunge into the thicket of the levels of scrutiny in this case.

The relationship of the fee to the burden and the appropriate standard of review were not in issue here. Even if they were, the *Dolan* standard of rough proportionality is already applicable in Arizona through the

reasonable relationship requirement of § 9-463.05(B)(4). For all these reasons, *Dolan* did not require the court of appeals to decide the case differently.

V. DISPOSITION

We approve the court of appeals' opinion except as it remanded the case to the trial court for further proceedings. We reverse the trial court's judgment and remand the case with directions to enter judgment for the City of Scottsdale.

FELDMAN, C.J., ZLAKET, V.C.J., and MOELLER and MARTONE, JJ., concur.

ROBERT J. CORCORAN, J., (retired) did not participate in this matter; pursuant to Ariz. Const. art. VI, § 3, CHARLES E. *1001 ARES, Judge Pro Tem., Arizona Court of Appeals, Division Two, was designated to sit in his stead.

HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, a non-profit Arizona corporation; for and on behalf of all similarly situated; Grupe Development Co. Inc., an Arizona Corporation; Knoell Bros. Construction, Inc., a Arizona corporation; Marlborough Development Corporation, an Arizona corporation, Plaintiffs-Appellees,

v.

CITY OF SCOTTSDALE, a municipal corporation; Herbert R. Drinkwater, Rene Wendell, James D. Bruner, Kathryn Campana, Myron R. Deibel, William Soderquist, and Bill Walton, members of the City Council of the City of Scottsdale, Defendants-Appellants.

No. 1 CA-CV 92-0210.

Court of Appeals of Arizona,
Division 1, Department B.

Feb. 16, 1995.

Review Granted Sept. 26, 1995. [FN*]

FN* Corcoran, J., of the Supreme Court, did not participate in the determination of this matter.

Developers brought action challenging city's water resource development fee. The Superior Court, Maricopa County, Cause No. CV-87-31929, William P. Sargeant, III, J., entered judgment for developers, and city appealed. The Court of Appeals, 179 Ariz. 5, 875 P.2d 1310, reversed in part and remanded in part. Developers petitioned for review. Granting review, the Supreme Court remanded matter with directions to reconsider in light of recent United States Supreme Court opinion. The Court of Appeals, Weisberg, P.J., held that: (1) development fee charged by city as condition to issuance of building permit was "regulatory fee" akin to land-use regulation implicating eminent domain, rather than "tax" not subject to takings clause, and (2) ruling in United States Supreme Court opinion did not affect Court of Appeals' prior opinion in matter.

Ordered accordingly.

Grant, P.J., filed dissenting opinion.

**1348 *244 Carmichael & Powell, P.C. by Ronald W. Carmichael, Sid A. Horwitz, Brian A. Hatch, Claudia J. Resnick, Phoenix, for plaintiffs-appellees.

Richard W. Garnett III, Scottsdale City Atty., Scottsdale, and Johnston, Maynard, Grant & Parker by Charles J. Adornetto, Phoenix, for defendants- appellants.

**1349 *245 Shelley & Bethea by J. LaMar Shelley, Mesa, for amicus curiae League of Arizona Cities and Towns.

SUPPLEMENTAL OPINION

WEISBERG, Presiding Judge.

After we filed our original opinion in this case, 150 Ariz.Adv.Rep. 47, 179 Ariz. 5, 875 P.2d 1310 (App. October 26, 1993), Plaintiffs-Appellees petitioned the Arizona Supreme Court to grant review. The supreme court granted review and remanded the matter to this court with directions to reconsider our opinion in light of the recent United States Supreme Court decision in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). See Ariz.R.Civ.App.P. 23(i)(2). We now expressly consider whether *Dolan* has any effect on our prior opinion. [1]

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[1] Our prior opinion set forth the factual and procedural history of this matter in some detail. We therefore move directly to a consideration of Dolan.

I. DOLAN V. CITY OF TIGARD

In Dolan, the United States Supreme Court faced the issue of whether a condition placed on the granting of a redevelopment permit was an unconstitutional taking.

As required by the State of Oregon, the City of Tigard adopted a land management program entitled the Community Development Code (the "CDC"). To minimize flood damage, the CDC required the preservation of greenways within the city's floodplain. For property within this area, the CDC required the city to condition development permits upon a dedication of "sufficient open land" to establish these greenways. To minimize traffic congestion, the CDC also required new developers within a delineated area to dedicate land for pedestrian/bicycle pathways.

Florence Dolan owned a store on property partly within the floodplain. She wanted to enlarge her store and parking lot and applied to the city for a redevelopment permit. Pursuant to the CDC, the city granted the permit on the condition that Dolan dedicate to the city for greenway all of that portion of her land within the floodplain, and an additional portion of land for a pedestrian/bicycle path.

After requesting and being denied a variance, Dolan brought suit against the city, arguing that its conditions were an unconstitutional taking under the Fifth and Fourteenth Amendments. The Oregon state courts upheld the city's conditions, finding that they were "reasonably related" to the city's interests in minimizing flooding and traffic congestion. The United States Supreme Court granted certiorari and reversed.

The Court analyzed the conditions under a two-step approach. First, it considered whether an "essential nexus" existed between the legitimate state interest and the conditions exacted by the city. 512 U.S. at ____, 114 S.Ct. at 2317. The Court had previously developed this step of the analysis in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In *Dolan*, the Court readily found an essential nexus between the city's interests and the conditions. 512 U.S. at ____, 114 S.Ct. at 2318.

Having found an essential nexus, the Court moved beyond Nollan to consider "the required degree of the connection between the exactions and the projected impact of the proposed development." *Id.* at ____, 114 S.Ct. at 2317. The Court determined that the required degree of connection was "rough proportionality," which is similar to the "reasonable relationship" standard adopted by the majority of state courts. *Id.* at ____, 114 S.Ct. at 2319.

The Court ruled in favor of Dolan because the city had failed to show that its conditions were "roughly proportional" in nature and extent to the burdens imposed by Dolan's proposed development. *Id.* at ____, 114 S.Ct. at 2321.

II. DEVELOPMENT FEES IMPLICATE THE TAKINGS CLAUSE OF THE U.S. CONSTITUTION

In analyzing the effect of *Dolan* on this court's opinion, we must first consider whether the fees charged by Scottsdale in this case **1350 *246 even implicate the power of eminent domain. [2] If the fees constitute a land-use regulation, eminent domain is implicated. If the fees are a tax, however, they are not subject to the Takings Clause. [3]

[1] Development fees, according to Arizona's enabling statute, are fees charged by the municipality to the developer of land "to offset costs to the municipality

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[2] We note that Scottsdale does not make the argument in its supplemental brief that an eminent domain analysis is inappropriate. Rather, it simply argues that the particular takings analysis applied in Dolan does not apply or, if it does, that it does not change our prior opinion.

[3] The Takings Clause provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

associated with providing necessary public services to [the] development." Ariz.Rev.Stat.Ann. ("A.R.S.") § 9-463.05 (1990). Development fees are generally considered regulatory fees if they are reasonably related to the needs created by the new development and are used to benefit the land on which they are imposed. On the other hand, they are considered taxes if the fees are not related to the new development and are used to benefit other property. *See, e.g., Russ Bldg. Partnership v. City & County of San Francisco,* 234 Cal.Rptr. 1, 5-6 (Ct.App.1987); *Contractors & Builders Ass'n v. City of Dunedin,* 329 So.2d 314, 317-20 (Fla.1976); *see also* Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?,* 23 Real Est.L.J. 7, 12 (1994); Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: "The Second Generation",* 38 Wash.U.J.Urb. & Contemp.L. 55, 64 (1990); Gus Bauman & William H. Ethier, *Development Exactions & Impact Fees: A Survey of American Practices,* 50 Law & Contemp.Probs. 51, 54 (1987).

[2] In the instant case, the payment of the fee was a condition to the city's issuance of a building permit. The fee charged by Scottsdale was for the express purpose of providing future water to the subject property. Thus, the fee was to be used to benefit the property on which the fee was imposed, rather than for general revenue. Also, the

extent of the property's need for future water was directly related to the new development. We therefore conclude that Scottsdale's development fee is a regulatory fee rather than a tax.

[3] We also note that development fees are distinguishable from special assessments which are not subject to a takings analysis. See, *White v. Kaibab Road Improvement Dist.*, 24 Ariz.App. 258, 537 P.2d 986 (1975) ("*White I* "), disapproved on other grounds, 113 Ariz. 209, 550 P.2d 80 (1976) ("*White II* "); *City of Tucson v. Rickles,* 15 Ariz.App. 244, 488 P.2d 180 (1971), vacated on other grounds, 109 Ariz. 82, 505 P.2d 253 (1973). Although both are monetary fees to fund public improvements, and are charged to the benefitted landowners, they differ in several significant respects.

Development fees are imposed by the government upon property-owners who wish to develop their land. Special assessments, however, generally are imposed only after the affected property-owners have petitioned for the creation of an improvement district. *See White II*, 113 Ariz. at 210, 550 P.2d at 81. The creation of the improvement district is for the express purpose of making the desired improvements. *White I*, 24 Ariz.App. at 261, 537 P.2d at 989. Given this process, there can be little concern that the government is "forcing some people alone to bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." *Dolan*, 512 U.S. at ____, 114 S.Ct. at 2316 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)).

Development fee ordinances are also more akin to land-use regulations than are special assessments because the fees are a condition on the ability to develop one's property. In addition, the fees are directly necessitated by the needs created by the new development. By comparison, special assessments are neither conditions on development, nor are they necessarily caused by new development. Thus, development fees, unlike special assessments,**1351 *247 can be considered land-use regulations.

[4] Moreover, the fact that the Scottsdale ordinance merely requires the payment of a fee does not preclude the application of a takings analysis. Courts have frequently applied a takings analysis to regulations that exact only money. *See, e.g., Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir.1991) (applying a takings analysis to an ordinance conditioning building permits on payment of fee to offset burdens of providing low-income housing for workers at such developments), cert. denied, 504 U.S. 931, 112 S.Ct. 1997, 118 L.Ed.2d 593 (1992); *Blue Jeans Equities W. v. City and County of San Francisco*, 3 Cal.App.4th 164, 4 Cal.Rptr.2d 114 (1992) (applying a takings analysis to an ordinance

conditioning building permit on payment of fee for traffic control programs). Also, the United States Supreme Court's remand of *Ehrlich v. City of Culver City*, 15 Cal.App.4th 1737, 19 Cal.Rptr.2d 468 (1993), indicates that the Supreme Court would apply a takings analysis to a purely monetary condition. *See Ehrlich v. City of Culver City*, ___ U.S. ____, 114 S.Ct. 2731, 129 L.Ed.2d 854 (1994). In *Ehrlich*, the developer wished to rezone his property. The city conditioned approval on the payment of a $280,000 "mitigation fee" to compensate for the community's loss of recreational facilities. The appellate court applied a takings analysis but determined that the condition was constitutional under the Takings Clause. The United States Supreme Court vacated the judgment and remanded for reconsideration in light of Dolan. This remand implies that monetary fees may be subject to a takings analysis. [4]

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[4] Scottsdale's development fee ordinance is also distinguishable from the ordinance at issue in *Third & Catalina Assocs. v. City of Phoenix*, 182 Ariz. 203, 895 P.2d 115 (App. 1994). In *Third & Catalina*, this Court held that a fire safety ordinance was not a land-use regulation, and therefore was not a taking. Scottsdale's development fee ordinance, however, is distinguishable from *Third & Catalina* because it is not a "safety regulation designed to protect human life," but instead imposes conditions upon the issuance of a building permit. The Scottsdale ordinance simply regulates the use of land by preventing development without the payment of a fee.

Because Scottsdale's development fee ordinance is more akin to a land-use regulation than a tax, we conclude that it is subject to the Takings Clause.

III. APPLICATION OF DOLAN

The Court in *Dolan* stated that a land-use regulation ordinarily would not violate the Takings Clause if it " 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " 512 U.S. at ____, 114 S.Ct. at 2316 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)). The Court concluded, however, that this standard did not apply to the case before it for two reasons:

> First, [the cases applying the traditional standard] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Id. Scottsdale argues, and we agree, that *Dolan* has no bearing upon its development fee ordinance because the special circumstances of *Dolan* are not present here.

First, the *Dolan* Court recognized the distinction between a legislative decision affecting entire areas of a city and an adjudicative decision affecting only an individual parcel. Clearly, the Scottsdale ordinance involves a legislative, rather than adjudicative, determination. While *Dolan* also involved a city ordinance, the crucial distinction lies in the amount of adjudicative, staff-level discretion permitted by each ordinance.

In *Dolan*, Tigard's ordinance allowed the City Planning Commission to determine the extent of the conditions to be placed upon the grant of a building permit. The Tigard ordinance merely required that "sufficient open land for greenway" be dedicated, and allowed the staff to determine what was "sufficient." *Dolan*, 512 U.S. at ____, 114 S.Ct. at 2314 (emphasis added).

**1352 *248 Conversely, the Scottsdale ordinance specifies the amount of the fee to be charged for each type of development. Unlike Tigard's ordinance, Scottsdale's allows its staff no discretion in setting the fees which are based upon a standardized schedule. The fees are tailored to the type of development involved and are uniform within each class of development. Because the fees are

standardized and uniform, and because the ordinance permits no discretion in its application, a prospective developer may know precisely the fee that will be charged. The Scottsdale ordinance, therefore, does not permit a *Dolan*-like ad hoc, adjudicative determination. [5]

The *Dolan* court was concerned with arbitrary, non-legislative conditions being placed upon landowners. *Dolan* is implicated when an administrator or commission exacts conditions from individual property-owners with little or no legislative guidance. This concern, however, is simply not present when the legislature, after undertaking sufficient analysis, has determined a policy and then mandated uniform and specific means of accomplishing that policy, as Scottsdale has done here.

[5] Second, the *Dolan* court distinguished between a dedication of land and a mere limitation on the use of property. *See Dolan,* 512 U.S. at ____, 114 S.Ct. at 2316. Scottsdale argues that development fees are more akin to use limitations because they do not pose the danger of "shifting public burdens to fortuitously situated

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[5] In our prior opinion, we remanded for a determination of the reasonable relationship between the amount of the development fee and the burden imposed upon Scottsdale by the new development, pursuant to A.R.S. section 9-463.05(B)(4). Of course, in determining whether such a relationship exists, the trial court must consider the costs of Scottsdale's proposed plan to determine whether the fees bear a reasonable relationship to the burdens imposed.

individual property owners." Appellees respond that the United States Supreme Court's remand of Ehrlich indicates that development fees are more similar to land dedications. While we agree that the *Ehrlich* remand implies that a monetary fee is subject both to a takings analysis, see supra, and, in the appropriate case, to a Dolan analysis, this second prong is not determinative here. Because we find that Scottsdale's development fees involve a legislative, rather than adjudicative, determination, we conclude that Dolan does not control the outcome of this case. [6]

CONCLUSION

Because the Scottsdale development fee ordinance is a legislative determination affecting the entire city, we conclude that the ruling in *Dolan* does not affect our prior opinion in this matter.

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[6] The Dissent's discussion is primarily a restatement of its original position: that the trial court acted within its discretion when it found that the proposed expenditure would not result in a beneficial use to the property. We addressed this issue in our earlier opinion in this case. See 150 Ariz.Adv.Rep. 47. Briefly, we believe that the benefit question is an issue of fact involving broad policy or public welfare considerations. The trial court must therefore acquiesce to the legislature's judgment "unless it is clearly erroneous, arbitrary and wholly unwarranted." It may not merely apply a reasonableness test and thereby substitute its judgment for that of the legislature. *Edwards v. State Bd. of Barber Examiners*, 72 Ariz. 108, 113, 231 P.2d 450, 452 (1951).

EHRLICH, J., concur.
GRANT, Presiding Judge, dissenting.

I dissent in this case for the second time. The supreme court granted a petition for review of our previous opinion and then remanded the case to us for reconsideration of our opinion in light of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). The majority concludes that because the Scottsdale development fee ordinance is a legislative determination affecting the entire city, the ruling in Dolan does not affect the prior majority opinion in this matter.

I have a different view of the application of Dolan to the facts of this case. In my previous dissent I agreed with the majority that deference should be afforded a municipality's determination of the reasonable amount of a development fee. I disagreed with the standard of review the majority applied to the trial court's determination of a "beneficial use" to the new subdivisions. I said that the **1353 *249 trial court should (as was done in this case) independently review the proposed expenditure and determine if it will result in a "beneficial use" to the new developments as required by the enabling statute. To facilitate this review, plans must exist in sufficient detail to enable the trial court to reasonably conclude that the expenditure will result in a "beneficial use."

The first requirement of *Dolan* is that an "essential nexus" must exist between a legitimate state interest and the permit condition. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S.Ct. 3141, 3148, 97 L.Ed.2d 677 (1987). If the "essential nexus" exists, then it must be decided whether the exactions demanded by the permit conditions bear the required relationship to the projected impact of the proposed development. This is essentially the same requirement as imposed by A.R.S. section 9-463.05(B)(4): "The amount of any development fees assessed pursuant to this section must bear a reasonable relationship to the burden imposed upon the municipality to provide additional necessary public services to the development." This comports with the second part of the *Dolan* test. In deciding this question *Dolan* held that the necessary connection required by the Fifth Amendment is "rough proportionality." *Dolan*, 512 U.S. at ____ - ____, 114 S.Ct. at 2319-20. The Dolan Court went on to say that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." This is essentially the reasonable relationship test adopted by the majority of the state courts.

In its original opinion the majority in this case applied a deferential standard of review to the municipality's determination of the cost of future water supplies. I agreed

with that standard of review and stated that this type of factual determination is best resolved through the political process at the legislative level. The majority did not revisit this standard of review in its supplemental opinion but holds that "[b]ecause Scottsdale's development fee ordinance is more akin to a land-use regulation than a tax, we conclude that it is subject to the Takings Clause." I agree.

The majority in its supplemental opinion, holds that *Dolan* does not apply to this case because the *Dolan* Court said that a land-use regulation ordinarily would not violate the Takings Clause if it " 'substantially advance [s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " 512 U.S. at ____, 114 S.Ct. at 2316 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)). The majority then distinguishes the fact that in *Dolan* the extent of the conditions to be placed upon the grant of a building permit were not specific, whereas the Scottsdale ordinance specified the amount of the fee to be charged for each type of development. The majority believes that because the Scottsdale ordinance specifies standardized fees, the ordinance does not permit a "*Dolan*-like ad hoc, adjudicative determination." The majority has to agree however, that a monetary fee is subject both to a takings analysis, and to a *Dolan* analysis. *See Ehrlich v. City of Culver City*, ___ U.S. ____, 114 S.Ct. 2731, 129 L.Ed.2d

854 (1994). The majority then leaps the chasm to its conclusion: "Because we find that Scottsdale's development fees involve a legislative, rather than adjudicative, determination, we conclude that *Dolan* does not control the outcome of this case." The majority decides that because the fee ordinance is a legislative determination affecting the entire city, *Dolan* does not impact the prior majority opinion in this matter. I must dissent from this conclusion.

In our original opinion I dissented because I concluded that the application of the funds created by the development fees to the specific water projects proposed by the city violated a different element, the "beneficial use" requirement imposed by A.R.S. section 9-463.05(B)(1). The *Dolan* court held that the city must quantify its finding beyond a conclusory statement that the dedication could offset some of the traffic demand generated by the development. Likewise Scottsdale has made the conclusory determination that the development fee will be used to increase the city's water supply without specifying **1354 *250 how that will be done. Scottsdale offers mere fanciful suggestions such as Planet Ranch, Water Factory 21, and buying water from the San Carlos Apache Tribe.

The *Dolan* court began by saying: "We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct.

3141, 97 L.Ed.2d 677 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." *Dolan*, 512 U.S. at ____, 114 S.Ct. at 2312. The *Dolan* court went on to say that:

> In evaluating petitioner's claim, we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city. *Nollan*, 483 U.S. at 837, 107 S.Ct. at 3148. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.

Id. at ____, 114 S.Ct. at 2317. The question is, simply stated, does the fee result in a beneficial use to the development charged or not? The issue presented in this case is narrow: will the city's expenditure of funds in the manner proposed reasonably result in a beneficial use to the new subdivisions? This question does not require determinations of policy or weighing of benefits to the general public as the police power issue does.

At trial in this case, the plaintiff established by a preponderance of the evidence that the proposed expenditure will not reasonably provide a beneficial use. Furthermore, the findings of the trial court below demonstrate that the second prong of the *Dolan* test,

"rough proportionality" was not met in this case either because there was no showing that any water would ever be produced as a result of the fee imposed. On appeal, this court is bound by the trial court's finding of this fact unless it is demonstrated to be clearly erroneous.

Scottsdale's plan for development of future water resources is almost nonexistent. The trial court found that the projects conceptually described in the plan are most likely not going to produce water. Therefore the trial court concluded that there would be no beneficial use to these developments in the foreseeable future. There is ample evidence in the record to support this finding of the trial court and therefore it should be affirmed. Absent beneficial use to the development, the city's imposition of a development fee to fund the proposed projects cannot be upheld on the basis of A.R.S. section 9-463.05. *Dolan v. City of Tigard* supports this holding. I would therefore affirm the trial court.

HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, a non-profit Arizona corporation; for and on behalf of all similarly situated; Grupe Development Co. Inc., an Arizona Corporation; Knoell Bros. Construction, Inc., a Arizona corporation; Marlborough Development Corporation, an Arizona corporation,
Plaintiffs-Appellees,
v.
CITY OF SCOTTSDALE, a municipal corporation; Herbert R. Drinkwater, Rene Wendell, James D. Bruner, Kathryn Campana, Myron R. Deibel, William Soderquist, and Bill Walton, members of the City Council of the City of Scottsdale,
Defendants-Appellants.

No. 1 CA-CV 92-0210.

Court of Appeals of Arizona,
Division 1, Department B.

Oct. 26, 1993.

Review Granted and Remanded
July 6, 1994. [FN*]

FN* Editor's Note: Upon grant of review the matter was remanded to the Court of Appeals for reconsideration in light of the United States Supreme Court opinion in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

Developers brought action challenging city's water resource development fee upon new developments as violating state law. The Superior Court of Maricopa County, Cause No. CV 87-31929, William P. Sargeant, III, J., entered judgment for developers, and city appealed. The Court of Appeals, Weisberg, J., held that: (1) city had basis supporting development fee to withstand clearly erroneous, arbitrary, and wholly unwarranted test; (2) ordinance did not assess fee in discriminatory manner; but (3) remand was required to determine whether amount of fee was reasonably related to burden imposed upon municipality.

Reversed in part and remanded in part.

Grant, P.J., filed dissenting opinion.

**1311 *6 Carmichael & Powell, P.C. by Ronald W. Carmichael, Sid A. Horwitz, Brian A. Hatch, Phoenix, for plaintiffs-appellees.

Richard W. Garnett III, Scottsdale City Atty., Scottsdale, and Johnston, Maynard, Grant & Parker by Charles J. Adornetto, Phoenix, for defendants- appellants.

Shelley & Bethea by J. LaMar Shelley, Mesa, for amicus curiae League of Arizona Cities and Towns.

OPINION

WEISBERG, Judge.

The City of Scottsdale appeals from a trial court ruling that Scottsdale Ordinance 1940, imposing a water resource development fee upon new developments, violates Ariz.Rev.Stat.Ann. ("A.R.S.") section 9-463.05. Because we hold that a municipality's factual determination should be upheld unless clearly erroneous, arbitrary, and wholly unwarranted, we reverse the trial court and, for other reasons discussed below, remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

In 1980, the Arizona Legislature passed the Groundwater Management Act ("Groundwater Code"). See A.R.S. §§ 45-401 to 704 (1987 & Supp.1992). The Groundwater Code requires municipalities to work toward achieving "safe yield," a long-term balance between the annual amount of groundwater withdrawn and the annual amount of natural and artificial groundwater recharge. Id. §§ 45-561, -562. Municipalities are required to provide an "assured water supply" before approving new development. Id. § 45-576(B). "Assured water supply" means that sufficient groundwater or surface water and appropriate delivery facilities will be continuously available to satisfy the water needs of all new development for 100 years. Id. § 45-576(L). Cities, including Scottsdale, with allocations of Central Arizona Project water are deemed to have an adequate water supply until December 31, 2000. Id. § 45-576(I). After that time, the director of water resources may find that the city does not have an assured water supply. Id.

In 1985, the Scottsdale city staff formulated a water resource plan. Based on the mandate of the Groundwater Code, the planners projected population growth, water demand, potential future sources, and potential financing for future sources. The planners proposed several new water sources including (1) transportation of water from

Planet Ranch, a piece of land in La Paz and Mohave Counties that has renewable water rights to Bill Williams River, and (2) construction of a water treatment plant ("Water Factory 21") that would treat sewage effluent to a potable water standard and recharge it into the underground aquifer. To raise funds for these potential sources, the planners recommended the imposition of a water resource development fee upon new developments.

In 1987, the Scottsdale City Council passed Ordinance No. 1940 ("the ordinance") codifying the plan's recommended water resource development fee ("the fee"). The ordinance assessed a fee of $1,000 per single family unit, $600 per dwelling unit in a multifamily dwelling unit, and, for other uses, $2,000 per acre/foot of estimated annual use required in addition to the present annual use. These amounts were calculated after considering the new water resources' estimated costs and the projected growth and water usage in Scottsdale.

Shortly after the ordinance took effect, Home Builders Association of Central Arizona ("HBA"), representing several developers who had paid the development fee under protest, filed a complaint claiming that the ordinance was void. HBA alleged that the fee did not offset costs associated with providing necessary public services to the developments, that the fee did not result in a beneficial use to the developments, that the fee did not bear a reasonable

relationship to any burden imposed upon Scottsdale, and that the fee discriminated against new homebuilders and new residents.

HBA subsequently filed a motion for summary judgment contending that the statutory **1312 *7 authority for development fees limited municipalities to the payment of costs of improvements that would actually and immediately accrue to the benefit of the new residents. Scottsdale filed its response and a cross-motion for summary judgment. The trial court granted partial summary judgment for Scottsdale, ruling that the benefit required by the statute need not accrue immediately.

Following trial, the trial court found that the ordinance failed to meet the statutory requirements because (1) any benefit received by new development resulting from the fee was too remote in time and speculative in nature, (2) the fee did not bear a reasonable relationship to the burden imposed on Scottsdale by new development, and (3) the fee discriminated against new developers. The trial court ordered Scottsdale to refund all fees collected under the ordinance.

Scottsdale subsequently amended the ordinance, adding a "refund" provision requiring Scottsdale to refund the fees if not appropriately spent within ten years from the date the fee was paid. Scottsdale filed a motion for new trial under

Rule 59, Arizona Rules of Civil Procedure, and a motion to amend filings under Rule 52. [1] Scottsdale contended that the amended ordinance justified a new trial. The trial court denied the motions and entered judgment in HBA's favor. This appeal followed.

DISCUSSION

A. Standard of Review

1. Judicial Review of Municipal Ordinances

a. Mandatory Effect

A.R.S. section 9-463.05 enables municipalities to assess development fees. [2] The statute requires that the fee "shall result in a beneficial use to the development," that the fee "must bear a reasonable relationship to the burden," and that the fee "shall be assessed in a non-discriminatory manner." A.R.S. § 9-463.05 (emphasis added). The use of "shall" and "must" indicates the mandatory nature of these requirements. See McDonald v. Frohmiller, 63 Ariz. 479, 486, 163 P.2d 671, 674 (1945). Municipalities may not use fees for any purpose or in any manner that will not

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[1] Due to our disposition of this case, we do not address the issues of the Rule 52 and 59 motions.

[2] Development fees; imposition by cities and towns

meet the statutory requirements. The underlying issue is whether the courts or the municipality should determine whether a fee meets these requirements when it is levied. This issue is resolved by examining the power of the courts to review policy determinations by municipalities.

A. A municipality may assess development fees to offset costs to the municipality associated with providing necessary public services to a development.

B. Development fees assessed by a municipality under this section are subject to the following requirements:

1. Development fees shall result in a beneficial use to the development.

2. Monies received from development fees assessed pursuant to this section shall be placed in a separate fund and accounted for separately and may only be used for the purposes authorized by this section.

3. The schedule for payment of fees shall be provided by the municipality. The developer of residential dwelling units shall be required to pay development fees when construction permits for the dwelling units are issued.

4. The amount of any development fees assessed pursuant to this section must bear a reasonable relationship to the

burden imposed upon the municipality to provide additional necessary public services to the development.

5. If development fees are assessed by a municipality, such fees shall be assessed in a non-discriminatory manner.

6. In determining and assessing a development fee applying to land in a community facilities district ... the municipality shall take into account all public infrastructure provided by the district and capital costs paid by the district for necessary public services and shall not assess a portion of the development fee based on the infrastructure or costs.

A.R.S. § 9-463.05 (1990) (amended 1991).

b. Deference to Legislature on Fact Issues

[1] The Arizona Supreme Court has adopted the rule that "courts will acquiesce in the legislative determination of all matters of fact unless it is clearly erroneous, arbitrary and wholly unwarranted." *Edwards v. State Bd. of Barber Examiners*, 72 Ariz. 108, 113, 231 P.2d 450, 452 (1951); *see also Folsom *8 **1313 Invs., Inc. v. City of Scottsdale*, 620 F.Supp. 1372, 1375 (D.Ariz.1985) ("The courts are to interfere only when the ordinance enacted pursuant to the grant is arbitrary and unreasonable."); *City of Glendale v. White*, 67 Ariz. 231, 238, 194 P.2d 435, 439 (1948)

(whether act constitutes a public purpose and method of performing act is within judgment of city council; courts will not overturn unless discretion "unquestionably abused"). The court also noted that "where an enactment bears any reasonable relationship to the end sought the courts may not substitute their judgment for the judgment of the legislature." *Edwards*, 72 Ariz. at 112-13, 231 P.2d at 452. Section 9-463.05 puts few specific restrictions on the municipality when determining what measures will meet the statutory requirements. Instead, the statute uses broad phrases: "result in a beneficial use" and "bear a reasonable relationship." A municipality should be given deference when determining whether an ordinance meets these requirements. *White*, 67 Ariz. at 238, 194 P.2d at 439.

HBA urges us to infer from the statute additional restrictions on municipalities, requiring specific plans and definite timetables before development fees would be upheld. Essentially, HBA encourages us to find requirements substantively similar to those statutorily imposed on municipalities when making special assessments. See A.R.S. §§ 48-571 to - 619 (1988). [3] Unlike the statutory requirements for special assessments, however, the legislature has not included any specific

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[3] Special assessments are imposed when specific improvements are made that directly benefit a local improvement district. Before imposing special assessments, municipalities are required to have specific plans and cost estimates. A.R.S. § 48-577.

requirements in the statutory grant for development fees. "Courts will not read into a statute something which is not within the manifest intent of the legislature as gathered from the statute itself." *State ex rel. Smith v. Bohannan,* 101 Ariz. 520, 524, 421 P.2d 877, 881 (1966). We therefore must examine the history and background of development fees to determine if the legislature intended such specific requirements.

2. Historical Background of Development Fees

Development fees, also known as impact fees, "are charges levied by local governments against new development in order to generate revenue for capital funding necessitated by the new development." Julian C. Juergensmeyer & Robert M. Blake, Impact Fees: *An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla.St.U.L.Rev. 415, 417 (1981). Development fees allow municipalities to transfer the costs of new infrastructure required by those new developments to the new developments themselves, as opposed to funding them through general revenue. Responding to developers' challenges, different states' courts have set out various standards for determining the validity of these fees. See id. at 427-33.

a. Early Restrictive Tests

Early decisions imposed restrictive standards on municipalities attempting to levy development fees. In 1960, a New York appellate court held that a town law imposing a fee in lieu of donating land for recreational purposes was an unconstitutional taking. *See Gulest Assocs., Inc. v. Town of Newburgh,* 25 Misc.2d 1004, 209 N.Y.S.2d 729, 732-33 (Sup.Ct.1960), aff'd, 15 A.D.2d 815, 225 N.Y.S.2d 538 (1962), overruled by *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 957, 218 N.E.2d 673, 675 (1966). The Gulest court reasoned that the town law would have improperly allowed the fee to be used to support recreational programs "not directly related to the development of the subdivision." Id. at 732. Because the ordinance did not require that generated funds be spent directly on the new development, the Gulest court found the town law unconstitutional. See *id.* at 733. Commentators have named this the "direct benefit" test. *See Juergensmeyer & Blake,* supra, at 428.

In 1961, the Illinois Supreme Court considered the constitutionality of development fees imposed to support educational and recreational facilities. *Pioneer Trust and Sav. Bank v. Village of Mount Prospect,* 22 Ill.2d 375, 176 N.E.2d 799 (1961). The *Pioneer* ***1314 *9 Trust* court held that "if the burden cast upon the subdivider is specifically and uniquely attributable to [the developer's]

activity, then the requirement is permissible." *Id.* at 802. Because it found that the development fees at issue were not "specifically and uniquely attributable" to the development, the Illinois court held the municipal ordinance unconstitutional. *Id.* at 803.

b. Less Restrictive Tests

In 1965, the Wisconsin Supreme Court applied a less restrictive test to consider the validity of development fees. *Jordan v. Village of Menomonee Falls,* 28 Wis.2d 608, 137 N.W.2d 442 (1965). The *Jordan* court reasoned that the Pioneer Trust "specifically and uniquely attributable" test was too restrictive. The *Jordan* court held that if the municipality could "establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people ... this would establish a reasonable basis for finding that the need for the acquisition [of additional facilities] was occasioned by the activity of the subdivider." *Id.* at 447. This test has been called the "rational nexus" test: municipalities must show a reasonable connection "between the need for additional facilities and the growth generated by the subdivision." *Juergensmeyer & Blake*, supra, at 431.

The *Jordan* court also found that the fees at issue were reasonable because the evidence supported a conclusion that

the "expenditures are greater than the amount which has been exacted from the subdivider by way of [the development fees]." 137 N.W.2d at 449. Commentators and courts have inferred a second "rational nexus" test from this language: a municipality must "demonstrate that its actual or projected extra development capital expenditures earmarked for the substantial benefit of a series of developments are greater than the capital payments required of those developments." *Juergensmeyer & Blake*, supra, at 432 (footnote omitted). Together, these tests form the "dual rational nexus test." *Id.* at 433.

HBA correctly notes that these background cases concern constitutional challenges and therefore do not directly apply to the instant case. These cases, however, predated section 9-463.05 and are useful when considering whether we should infer specific requirements that are not expressly stated in the statute itself. Also, the Arizona statute adopts criteria very similar to the dual rational nexus test.

The enabling statute states that a fee must "result in a beneficial use" and must "bear a reasonable relationship to the burden imposed upon the municipality." A.R.S. § 9-463.05. These requirements parallel the dual rational nexus test, which requires that a fee must relate to capital improvements needed because of development and that the amount of the fee cannot exceed the proportional cost

created by a subdivision's needs. See *Jordan*, 137 N.W.2d at 447, 449.

Other provisions of the statute also guarantee these results. For example, municipalities must keep the funds raised by a development fee in a separate account that can be spent only for the benefit of the developments. A.R.S. § 9-463.05(B)(2); *see Hollywood, Inc. v. Broward County*, 431 So.2d 606, 611-12 (Fla.Dist.Ct.App.1983) (earmarking fees satisfies second rational nexus test). Municipalities must also impose the fee in a nondiscriminatory manner, protecting an individual developer from having to pay more than its proportionate share among new developers. See A.R.S. § 9- 463.05(B)(5). Considering the state of the law at the time the Arizona Legislature passed section 9-463.05, it appears the legislature adopted the less restrictive standards espoused by the dual rational nexus test. *See Bartning v. State Farm Fire & Casualty*, 162 Ariz. 48, 49, 780 P.2d 1389, 1390 (App.1988) (presumption that legislature is aware of existing case law).

Legislative history supports this conclusion. When introduced, the sponsors of section 9-463.05 proposed requiring that fees "result in a direct benefit." S. 1197, 35th Leg., 2d Sess. (1982) (emphasis added). As passed, the statute merely requires that the fees "result in a beneficial use." A.R.S. § 9-463.05(B)(1). The legislature chose the less restrictive language. Although not

dispositive by itself, this change is evidence supporting the conclusion that the legislature did not **1315 *10 intend to establish overly specific requirements. *See Arizona Press Club, Inc. v. Arizona Bd. of Tax Appeals, Div. 1*, 113 Ariz. 545, 546-47, 558 P.2d 697, 698- 99 (1976) (deletion from original bill in the process of enactment is weak evidence of intent of legislature). [4]

c. Development Fees Are Not Special Assessments

Commentators note that when "applying the restrictive *Pioneer Trust* and *Gulest* tests, courts imposed the substantial requirements of a special assessment on such payment requirements." *Juergensmeyer & Blake*, supra, at 429. HBA contends that such special- assessment-like standards are required by section 9-463.05. Although agreeing that a development fee's benefits need not be as restricted to the subject development as would a special assessment's benefits, the dissent also goes on to require the same specific and definite plans that are required for special assessments.

Generally, standards governing special assessments in Arizona are set forth in sections 48-571 to -619. The specific and definite plans that the dissent argues are

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[4] This legislative history also rebuts the dissent's reading of beneficial use as requiring a "direct" benefit to the development.

necessary for development fees are actually required by statute for special assessments. See A.R.S. § 48-577. Statutory sections governing special assessments expressly list those projects that may be funded by special assessments, see A.R.S. §§ 48-572 to -575, and those procedures necessary when proposing and implementing special assessments, see, e.g., A.R.S. §§ 48-576, -578.

[2] Development fees, however, are not the same as special assessments. The two fees have different uses and different standards. The developers in the *Jordan* case urged the application of special-assessment-like standards, similar to HBA's position in the instant case; the Wisconsin Supreme Court, however, held that development fees were not subject to such standards. 137 N.W.2d at 450. We agree. Considering the background of development fees and the statutory provisions enacted by our legislature, we will not infer more specific provisions than the legislature provided.

3. Deference Under A.R.S. Section 9-463.05

Because we find that the less restrictive standards approach applies to section 9-463.05, the statutory requirements imposed on municipalities must be construed broadly. Specific plans and direct benefits are not required. The municipality need only show some rational basis for setting the amount of the fee in order to avoid it

being "clearly erroneous, arbitrary, and wholly unwarranted." If the municipality can show that its plans, calculations and predictions are not "clearly erroneous, arbitrary, and wholly unwarranted," we will defer to its judgment and uphold an ordinance as satisfying the broad requirements of section 9-463.05. [5]

The dissent would apply different standards of review to the municipality's determination of the "reasonable amount" and "beneficial use" requirements. The dissent would agree that the former is within the broad discretion of the municipality, but not the latter. We find no reason for such disparate treatment.

The dissent concedes that the benefit issue is a factual question, at 14, 875 P.2d at 1319 (citing *Hensley v. Town of Peoria,* 14 Ariz.App. 581, 485 P.2d 570 (1971)), but states that deciding whether an ordinance will "result in a beneficial use" involves only a narrow statutory decision rather than broad policy or public welfare concepts under the state's police power. We disagree. We believe, as illustrated in the instant case, that a municipality's

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[5] The dissent applies a preponderance of the evidence standard and, therefore, finds that because there is evidence in the record supporting the trial court's ruling, it should be upheld. Because we give discretion to the municipality, we review the record to see if there is evidence supporting its judgment.

structuring of a development fee for the benefit of its residents involves a complex policy determination. In Hensley, this court held that both the question of benefit and method of computation are issues **1316 *11 of fact, but did not address the standard to be applied by the trial court when reviewing the benefit issue. 14 Ariz.App. at 583, 485 P.2d at 572. On review after remand, this court held, and the dissent agrees, that the municipality should receive deference on the method of computation. *See Town of Peoria v. Hensley*, 26 Ariz.App. 30, 32, 545 P.2d 992, 994 (1976). In the instant case, we hold that the municipality should also receive deference on the benefit issue. In reality, the benefit determination involves policy considerations far more challenging than those involved in the cases which the dissent cites with approval. *See White*, 67 Ariz. at 238, 194 P.2d at 439 (determination of public purpose is within discretion of municipality). [6]

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[6] The dissent attempts to distinguish the instant case and White by noting that the White court was reviewing acts of a municipality that were not mandated by either the constitution or a statute. In reality, however, the instant situation is similar to White. The White court found that, absent specific restrictions, municipalities should be given discretion to determine whether an expenditure meets the broad "public purpose" requirement of the Arizona Constitution. *See Ariz. Const.*, art. 9, § 7; *White*, 67 Ariz. at 238, 194 P.2d at 439. In the instant case, section 9-463.05 imposes a broad requirement that a development fee "result in a more beneficial use." We follow the reasoning of the White court and hold that the municipality has discretion to determine whether its actions meet this broad statutory directive.

The dissent's suggestion that the trial court should apply a preponderance of the evidence standard to the question of whether an ordinance will result in a "beneficial use," see at 15, 875 P.2d at 1320, would result in substituting the trial court's judgment for that of the municipality. Such a result would violate case law and thwart good policy. A municipality has the personnel and expertise to consider matters concerning acquisition of water supplies and its effect on current and future residents. The trial court, therefore, ought to give due deference to a municipality's policy decision. [7]

The dissent cites *Fluckey v. City of Plymouth*, a Michigan special assessment case, to support its distinction and its standard, but that case only stated that road widening was not conclusively beneficial. See 358 Mich. 447, 100 N.W.2d 486, 488 (1960). In fact, the Michigan court applied a much higher standard than the dissent indicates; the court found that the ordinance would not result in a benefit only after holding that "no reasonable person or jury" could find a benefit. See id. "No reasonable person or jury" is a far more difficult standard than the

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[7] The dissent also argues that the municipality should not be able to base its ordinance on a bare assertion that it will spend funds in accordance with the statute. We do not disagree with this position. An ordinance based on a bare assertion would be arbitrary and, thus, invalid. This conclusion, however, does not prohibit giving deference to the municipality.

preponderance of the evidence rule suggested by the dissent. *See, e.g., Orme Sch. v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (summary judgment appropriate if "reasonable people could not agree with the conclusion advanced"). The Michigan court emphasized that the "assessors, not the court, weigh the benefits, if, in truth, there are benefits to be weighed." Fluckey, 100 N.W.2d at 489. We read this case as supporting our holding that municipalities should be given discretion on a benefit issue.

B. Application

1. Beneficial Use

The trial court found that Scottsdale could reasonably conclude that the municipality will need new water supplies to support new development. HBA does not dispute this finding on appeal. HBA argues instead that, because Scottsdale is not proceeding in a timely manner with its planned capital projects, the fee could not benefit any new developments during the foreseeable future.

[3] The trial court heard evidence that Scottsdale was not actively pursuing the specific projects included in its 1985 water plan. At a hearing, the trial court expressed its opinion that the Planet Ranch project would not produce water:

> [Scottsdale's] own witnesses ... said ... there may not be one drop of water that ever comes off Planet Ranch. In fact, there was the likelihood it would be sold, so forth. So how can you say that that $1,000 bears a relationship to anything? *12 **1317 ... There's no immediate benefit because there's nothing coming open over here....

The trial court's factual findings and legal conclusions reflect its skepticism that the proposed projects would ever come to fruition:

> [Finding of fact # 13] Any benefit that may be received by new development is so remote in time and speculative in nature, that it does not meet the statutory criteria under A.R.S. § 9-463.05.
>
> [Conclusion of law # 6] Any beneficial use to the development is too remote and speculative to be realized by the development in the foreseeable future.

While the trial court based its conclusion on the fact that any possible benefit is too remote and speculative in nature, as previously discussed, section 9-463.05(B)(1) does not include any "direct benefit" requirement. The municipality is not required to have specific plans that must, by necessity, yield specific results to a specific development within a given period of time before it may assess development fees. The only requirement is that the municipality has any basis for the fee that withstands the

"clearly erroneous, arbitrary, and wholly unwarranted" test.

In the present case, the bases supporting Scottsdale's development fee are 1) the Planet Ranch project, 2) the Water Factory 21 project, and 3) other projects considered since the adoption of the ordinance, such as leasing water from the San Carlos Apache Tribe. In any event, the mere finding that none of these plans are currently being implemented is not sufficient because section 9-463.05(B)(1) does not require a showing of immediate benefit.

2. Reasonable Relationship

The amount of the development fee "must bear a reasonable relationship to the burden imposed upon the municipality." A.R.S. § 9-463.05(B)(4). The trial court ruled that, because the development fee did not provide a benefit to the new developments, there could be no reasonable relationship. Thus, the trial court did not examine the reasonable relationship of the fee to the municipal burden.

Whether a fee bears a "reasonable relationship to the burden imposed upon the municipality" is a separate issue from whether a fee will "result in a beneficial use." If a development fee fails the "beneficial use" test, the trial

court is correct that inquiry into whether a fee bears a "reasonable relationship" would be meaningless. But if the municipality's determination that the fee will "result in a beneficial use" is upheld, the court must independently examine the amount of the fee.

[4] Again, the municipality's determination of the fee's amount should receive deference by the courts. The enabling statute does not require precision, only a "reasonable relationship." Furthermore, because the enabling statute does not require specific plans, the fact that the municipality may spend the fees on projects not originally planned does not invalidate the calculation. So long as the fee still bears a reasonable relationship to the method of obtaining the "beneficial use," the fee meets the "reasonable relationship" requirement.

3. Non-discriminatory Manner

[5] Development fees must "be assessed in a non-discriminatory manner." A.R.S. § 9-463.05(B)(4). HBA argues that Scottsdale arbitrarily draws a line between new and old residents and, by assessing the development fee, unfairly charges new residents more for water. HBA further argues that Scottsdale fails to adequately account for the cost differences between the new and old water supplies and that Scottsdale fails to consider current available groundwater sources. Notwithstanding HBA's arguments,

however, these factors determine the reasonableness of the fee's amount, not the manner in which it is imposed. Whether the fee is imposed in a non-discriminatory manner is a separate issue.

In a sense, all development fees "discriminate" between old and new developments. Development fees, by definition, will place an additional burden upon new developments. This fact alone does not indicate discrimination, and HBA has not asserted any discrimination in the way the fee is imposed except for this general allegation. HBA does not **1318 *13 assert that the schedule of payment unfairly allocates the costs among new developers; it simply argues that the fee as a whole is discriminatory. HBA's rationale would make the enabling statute itself a contradiction; a municipality could not impose a development fee against future developers because it would discriminate between them and past developers. Obviously, the legislature did not intend such a result when authorizing development fees. We conclude, therefore, that the ordinance does not assess the fee in a discriminatory manner.

C. Disposition

[6] "[T]he rule which applies to this case is that where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record

permits only one resolution of the factual issue." *Higdon v. Evergreen Int'l Airlines, Inc.*, 138 Ariz. 163, 167, 673 P.2d 907, 911 (1983) (citing *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 332, 95 S.Ct. 472, 480, 42 L.Ed.2d 498 (1974)). We hold that, given the minimal burden of proof incumbent upon the municipality and because we find sufficient evidence in the record to meet this minimal burden, the record allows only one conclusion on the following issues: Scottsdale's development fee will result in a beneficial use and it is imposed in a non-discriminatory manner. As noted above, the trial court never actually decided the issue of whether the fee bore a reasonable relationship to the burden placed on Scottsdale. The record indicates that both sides were prepared to present evidence on that issue, but the trial court decided that it was unnecessary because it had found no beneficial use. As a result, the record contains no discussion concerning the fee's amount. Because we find that the development fee will result in a beneficial use, the trial court must consider this issue. Thus, we remand the issue whether the amount of the development fee is reasonably related to the corresponding burden placed upon the municipality.

D. Attorney's Fees

HBA filed a motion for award of attorney's fees. Because of our disposition, there is no successful party at this stage

of the litigation. We therefore decline to decide the issue of attorney's fees.

CONCLUSION

Because we conclude that the municipality's determination that its development fee will result in a beneficial use is not clearly erroneous, arbitrary, and wholly unwarranted, and that the fee is assessed in a non-discriminatory manner, we reverse the trial court in part. Because we find that the trial court did not reach the question whether the development fee is reasonably related to the burden placed upon the municipality, we remand in part.

EHRLICH, J., concurs.

GRANT, Presiding Judge, dissenting.

I respectfully dissent because I believe that the decision of the trial court should be affirmed.

I agree with the majority that deference should be afforded a municipality's determination of the reasonable amount of a development fee. I disagree with the standard of review the majority applies to the trial court's determination of a "beneficial use" to the new subdivisions. The trial court should, as was done in this case, independently review the proposed expenditure and determine if it will result in a

"beneficial use" to the new developments as required by the enabling statute. To facilitate this review, plans must exist in sufficient detail to enable the trial court to reasonably conclude that the expenditure will result in a "beneficial use."

A. Amount: Reasonable Relationship

A.R.S. section 9-463.05(B)(4) requires the following: "The amount of any development fees assessed pursuant to this section must bear a reasonable relationship to the burden imposed upon the municipality to provide additional necessary public services to the development."

The majority applies a deferential standard of review to the municipality's determination of the cost of future water supplies. ****1319 *14** With this, I agree. How much it will cost to provide new sources of water is a question of fact involving judgments as to degree and estimates of non-verifiable factors. This type of factual determination is best resolved through the political process at the legislative level. The city council should be afforded this discretion when determining the reasonable amount of the charge. *See Town of Peoria v. Hensley*, 26 Ariz.App. 30, 545 P.2d 992 (1976) ("*Hensley II* ") (deferring to town council on the amount of benefit for a special assessment). The court should not substitute its judgment for that of the legislative body and should not overturn such a legislative

finding unless it is clearly erroneous, arbitrary and wholly unwarranted. *Id.* at 32, 545 P.2d at 994; contra *Banberry Development Corp. v. South Jordan City,* 631 P.2d 899, 901 (Utah 1981) ("[The] reasonableness of the dedication or cash requirement in a particular case [is] a question of fact that must be resolved at trial."); *Hollywood, Inc. v. Broward County,* 431 So.2d 606 (Fla.Dist.Ct.App.1983).

The amount of Scottsdale's development fee is based on Planet Ranch, Water Factory 21, and other projects considered since the adoption of the ordinance, such as obtaining water from the San Carlos Apache Tribe. Using the projected costs of these projects to establish the cost of new water supplies could possibly satisfy the "reasonable relationship" requirement of the statute under the not clearly erroneous deferential standard of review. [8]

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[8] It is possible for a city to reasonably establish the amount of the fee based on the projected cost of projects the city never expects to implement. There are many possible ways for a city to reasonably estimate the future capital cost of obtaining new sources of water. For example, data on the cost of recent projects implemented by other cities could be reviewed to determine an average range of expense. Then, by estimating the projected growth of the city and through application of accounting techniques, the future cost to the city could be projected and this could be related to the per residence development fee charged. Even though the actual project eventually implemented to provide new sources of water would be entirely different than any of the projects studied to develop a basis for the amount of the fee, the fee could possibly withstand a deferential review.

The trial court correctly refrained from reaching this issue, however, because the application of the funds to the specific projects proposed by the city violates a different element, the "beneficial use" requirement imposed by A.R.S. section 9-463.05(B)(1).

B. Beneficial Use: Standard of Review

What constitutes a beneficial use is a question of law to be judicially determined. Whether the facts in a particular case show that a project will result in a beneficial use to a development is a question of fact that should be determined at the trial court level. *Hensley v. Town of Peoria,* 14 Ariz.App. 581, 485 P.2d 570 (1971) ("*Hensley I* "). Unlike the issue of a reasonable relationship between the burden and the fee, the beneficial use issue does not involve judgments as to degree nor weighing of non-verifiable factors. The trial court has not simply substituted its judgment for that of the municipality by reviewing a mere error in judgment on the part of the city. The question is more fundamental in nature. Simply stated, does the fee result in a beneficial use to the development charged or not?

Arizona courts addressed this issue in *Hensley I.* There the Town of Peoria assessed the plaintiffs for the installation of a sewer system which fronted their property. *Id.* at 582, 485 P.2d at 571. The plaintiffs contended that

the sewer system would not benefit their property. *Id.* This court reversed a grant of summary judgment in favor of the town concluding that "[i]t is thus a factual question [for the trial court to determine] as to whether plaintiffs' property ... can at this time directly benefit from the sewer system." *Id.* at 583-84, 485 P.2d at 572-73. On remand, the trial court found that the sewer system did benefit the property. *See Hensley II,* 26 Ariz.App. at 31, 545 P.2d at 993. It was only after the trial court made this determination that we applied a deferential standard of review to the town's determination of the amount of the benefit. *Hensley II,* 26 Ariz.App. at 32, 545 P.2d at 994.

The majority cites *Edwards v. State Board of Barber Examiners,* 72 Ariz. 108, 231 P.2d **1320 *15 450 (1951), *Folsom Investments, Inc. v. City of Scottsdale*, 620 F.Supp. 1372 (D.Ariz.1985), and *City of Glendale v. White,* 67 Ariz. 231, 194 P.2d 435 (1948), for the proposition that the legislative determination of the existence of a beneficial use to the subdivision should be given great deference. The majority interprets these cases as requiring a court to offer great deference to all legislative findings of fact. Such a broad and generalized interpretation should be avoided.

Edwards and Folsom involved challenges to an exercise of police powers which requires that the action reasonably tend to secure the public health, safety or general welfare.

Edwards involved a challenge to a regulation establishing a minimum charge for a hair cut and Folsom involved a challenge to a land use zoning restriction.

White involved a challenge to a city's expenditure of funds for membership dues in the Arizona Municipal League. The issue was whether the expenditure was for a "public purpose." Central to the court's holding, giving deference to the legislative determination of "public purpose," was the absence of any constitutional provision or law forbidding such action by the city. *White,* 67 Ariz. at 238, 194 P.2d at 439. In the case at bar, a statutory restriction on the city's action does exist and the issue is whether the city's action comes within this restriction. Therefore the holding in White should not be applied.

The issue presented in this case does not involve the broad concept of "public welfare" or "public purpose," but is much narrower: will the city's expenditure of funds in the manner proposed reasonably result in a beneficial use to the new subdivisions? This question does not require determinations of policy or weighing of benefits to the general public as the police power issue does. Therefore *Edwards, Folsom* and *White* are inapposite. The legislative determination of beneficial use need not be given the same deference as in the police power cases. *See Hensley I,* 14 Ariz.App. at 583- 84, 485 P.2d at 572-73.

The Michigan courts have used this less deferential standard of review in the context of special assessments for street improvements. *Fluckey v. City of Plymouth,* 100 N.W.2d 486 (Mich.1960). Deference is afforded legislative findings on the issue of the amount of benefit but not for the more fundamental question of whether a benefit exists as opposed to a detriment. *Id.* at 489. The Supreme Court of Michigan reasoned that in an earlier time almost any possible improvement to a street was automatically a benefit to the abutting properties. Id. In modern times, this is no longer the case. Under some circumstances, such as changing a small residential lane into a major arterial highway, the abutting properties may in fact experience a detriment as opposed to a benefit. *Id.* I consider this view to be well reasoned, although I recognize this modern approach is the minority view. *See Wade R. Habeeb, Widening of City Street as Local Improvement Justifying Special Assessment of Adjacent Property,* 46 A.L.R.3d 127 (1972). The Michigan approach parallels existing Arizona case law. *See Hensley I,* 14 Ariz.App. at 583-84, 485 P.2d at 572-73.

In this case, at trial the plaintiff established by a preponderance of the evidence that the proposed expenditure will not reasonably provide a beneficial use to the new development. On appeal, this court is bound by the trial court's finding of this fact unless it is demonstrated to be clearly erroneous.

C. Plan

The majority correctly points out that the statutory requirements for plans and specifications imposed on special assessments are not present in the context of development fees. This does not mean the municipality may proceed without any plans other than its mere allegation that plans exist. Rather, the only implication is that the plans may not require the same level of specificity and detail. Plans must exist in sufficient detail for a court to determine if the proposed expenditure of funds falls within the restrictions imposed by the enabling statute. *Julian C. Juergensmeyer & Robert M. Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla.St.U.L.Rev. 415, 432 n. 99 (1981). The bare assertion of the legislative body that the funds will be expended in accordance with **1321 *16 the statute will not suffice. *See Home Builders Ass'n of Cent. Ariz. v. Riddel,* 109 Ariz. 404, 510 P.2d 376 (1973) (involving a parks and recreation facilities tax).

D. Benefit

The second prong of the dual rational nexus test contains a benefit element requiring the funds to be "earmarked for the substantial benefit of a series of developments." *Juergensmeyer & Blake*, supra, at 432. *Juergensmeyer & Blake* give the following example:

> [W]hen the capital improvements financed by the fee requirements are remote from the particular subdivision the "benefit" requirements would not be met. For example, if no parks or playgrounds have been constructed or planned to meet the needs of the particular subdivision and none are contemplated, an impact fee for recreational facilities would not substantially benefit the development. The second rational nexus requirement would not be met.

Id. at 432 n. 99. This "benefit" element was incorporated into the Arizona statute by requiring that "[d]evelopment fees shall result in a beneficial use to the development." A.R.S. § 9-463.05(B)(1) (emphasis added).

I agree with the majority that "beneficial use" calls for a less restrictive test than would be required for special assessments. In the context of special assessments the improvement must not be "one of practically equal benefit for the entire city." *Mosher v. City of Phoenix,* 39 Ariz. 470, 480, 7 P.2d 622, 626 (1932). For example, a sewer system that is declared a benefit to the whole community cannot be financed by special assessment. *City of Globe v. Willis,* 16 Ariz. 378, 146 P. 544 (1915). Conversely, if expansion of a sewer plant was necessitated by new residential developments, a development fee could be imposed on the new subdivisions to finance the expansion of the facility so long as it results in beneficial use to the

subdivision, even though the new facility would also benefit the entire city equally.

The benefit to be conferred under a fee as opposed to a tax has been discussed in *Stewart v. Verde River Irrigation & Power Dist.*, 49 Ariz. 531, 68 P.2d 329 (1937).

> A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society. We think it is clear that the payment which plaintiff is seeking to recover is in no sense a tax, but is rather a fee. In the first place, the necessity of its payment does not arise unless and until the individual request [sic] the public authority to perform some particular service. So long as the service is not asked, the money will never be demanded. In the second place, the service which is requested of the defendant is one which obviously and admittedly will confer a particular benefit on plaintiff alone, and upon no other person, natural nor artificial.

Id. at 544-45, 68 P.2d at 334-35.

In *Kyrene School Dist. No. 28 v. City of Chandler,* 150 Ariz. 240, 722 P.2d 967 (App.1986), on facts closer to the present case, this court took a somewhat softer view toward the benefit requirement. The rigid language of "benefit not shared by other members of society" and "benefit on plaintiff alone, and upon no other person, natural nor artificial" was rejected. "[W]e do not interpret Stewart as setting forth an inflexible guide by which a tax and a fee are measured. Since broad general concepts are involved, it would be virtually impossible to set forth a rigid definition of a tax and a fee." *Id.* at 243, 722 P.2d at 970. *Kyrene School District* involved a challenged wastewater system development fee slated to finance expansion of the city's water and sewer system under a council approved five-year wastewater capital improvement program and a water and wastewater system master plan. This court held that the charge satisfied the benefit requirement because the school district was receiving the **1322 *17 overall benefit of the water and wastewater systems in exchange for the system development charges. Id.

The present case is analogous to *Kyrene School District* in the sense that, if the funds were spent to upgrade the capacity of Scottsdale's water system, this would benefit the new subdivisions and meet the benefit requirement of the statute.

E. Use

In addition to the requirement that the fee result in a benefit, the fee must also result in a "use" to the development. A.R.S. § 9-463.05(B)(1). This element is specifically included in the enabling legislation but the majority relegates it to obscurity and seems to completely overlook the impact of this term.

The word "use" has been subjected to differing interpretations. The words of a statute should be given their ordinary meaning unless it appears from the context that a special meaning was intended. *Mid Kansas Federal Savs. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991). If possible, courts should give meaning to all the language used in a statute and avoid an interpretation that renders a term duplicative or meaningless. *Wiseman v. Arizona Highway Dep't ex rel. Campbell*, 11 Ariz.App. 301, 303, 464 P.2d 372, 374 (1970). In the context of reviewing an exercise of eminent domain the word "use" has been held to mean simply "benefit." *Citizens Utils. Water Co. v. Superior Ct.*, 108 Ariz. 296, 299, 497 P.2d 55, 58 (1972). Utilizing this interpretation in the context of A.R.S. section 9-463.05 would render the word duplicative and meaningless: the fee shall result in a beneficial benefit to the development. The legislature must have intended a more traditional definition of the word "use" such as "the

act or practice of employing something." Webster's Ninth New Collegiate Dictionary (1984). Under this interpretation of the statute, the fee must result in the development directly employing something to its benefit.

Scottsdale's plan is almost nonexistent. The trial court found that the projects conceptually described in the plan are most likely not going to produce water. The trial court heard extensive testimony on this issue and reasonably concluded that there would be no beneficial use to these developments for the foreseeable future. Since there is ample evidence in the record to support this finding, the trial court's finding should be upheld. Absent a beneficial use to the development, the city's imposition of a development fee to fund the proposed projects cannot be upheld on the basis of A.R.S. section 9-463.05. I would therefore affirm the trial court.

FINDINGS OF FACT

The Court having considered the testimony and exhibits presented at trial,

FINDS that:

1) Plaintiff, Home Builders Association of Central Arizona (Home Builders Association) is a non-profit Arizona corporation authorized to do and doing business in Maricopa County, Arizona.

2) Plaintiffs, Grupe Development Company, Inc. (Grupe), Knoell Brothers Construction, Inc. (Knoell) and Marlborough Development Corporation (Marlborough), all Arizona companies authorized to do and doing business in Maricopa County Arizona, are members of the Home Builders Association and are all engaged in the business of constructing dwelling units in the City of Scottsdale.

3) Defendant, City of Scottsdale (Scottsdale), is a municipal corporation duly chartered and established by the State of Arizona.

4) Defendants, Herbert R. Drinkwater, Rene Wendell, James D. Bruner, Kathryn Campana, Myron R. Deibel and Bill Walton, were the duly elected City Council of Scottsdale at the time Ordinance No. 1940 was adopted.

5) The Arizona Groundwater Act (the "Act") adopted in 1980, Chapter II, Title 45, Arizona Revised Statutes, set a long range goal for safe yield for the Phoenix Active Management Area (AMA), to be achieved no later than January 1, 2025. Safe Yield is defined as "a groundwater management goal which attempts to achieve and thereafter maintain a long term balance between the annual amount of groundwater withdrawn in an AMA at the annual amount of natural and artificial recharge in the active management area". A.R.S. § 45-561(6). Thus, the fundamental goal of the Act is that no more groundwater may be withdrawn from an AMA than is replaced naturally or artificially.

6) In 1985, Leonard Dueker, Assistant to the City Manager, authored a water resource plan for the City of Scottsdale.

7) On or about July 6, 1987, the City Council of Scottsdale enacted Ordinance No. 1940. Ordinance No. 1940 became effective October 5, 1987 and required as a condition precedent to the issuance of a building permit, that developers including the plaintiffs, pay to Scottsdale a water resources development fee (the "subject development fee") in addition to the usual building fees paid by said developers.

8) The statutory authority for enactment of Ordinance No. 1940 was A.R.S. § 9-463.05, as that section read in 1987.

9) Plaintiffs, other developers of residential and other parties within Scottsdale have been required to pay the subject development fee imposed by Ordinance No. 1940 after October 5, 1987 in order to obtain building permits in Scottsdale.

10) Plaintiffs have failed to prove that the City of Scottsdale has an adequate water supply for the foreseeable future.

11) Facts existed in 1987 from which the City Council of Scottsdale could have concluded that it was reasonably necessary to acquire additional water resources.

12) The City of Scottsdale has placed conservation requirements upon residential, commercial and industrial development within the City of Scottsdale.

13) Any benefit that may be received by new development is so remote in time and speculative in nature, that it does not meet the statutory criteria under A.R.S. § 9-463.05.

14) The Water Resource Development Fee assessed by the City of Scottsdale does not bear a reasonable relationship to the burden imposed on Scottsdale by new development.

15) Scottsdale Water Resource Development Fee does not meet the statutory criteria required to satisfy A.R.S. § 9-463.05 and is, therefore, void.

16) The Scottsdale Water Resource Development Fee is void and all proceeds collected by the City of Scottsdale shall be refunded to the plaintiffs and other payors of the Water Resource Development Fee together with accrued interest thereon.

17) Pursuant to the Private Attorney General Doctrine, the plaintiff should be granted its reasonable attorneys' fees.

The Court CONCLUDES as a matter of law that:

1) A.R.S. § 9-463.05 authorizes municipalities within the State of Arizona to enact development fees for the purposes of defraying the costs of providing necessary public services the need for which is generated by new development.

2) A presumption of validity attaches to development fees enacted by a city.

3) The burden of proof is on plaintiff to demonstrate that the fee does not comply with the standards of A.R.S. § 9-463.05.

4) Enactment of the fee was a legislative act of the Scottsdale City Council exercising its discretion within the scope of its authority.

5) The provision of an adequate supply of water is a necessary public service for which the City of Scottsdale is responsible within its territorial limits.

6) Any beneficial use to the development is too remote and speculative to be realized by the development in the foreseeable future.

7) The Scottsdale Water Resources Development Fee does not bear a reasonable relationship to the burden imposed upon the City's water supply by the development securing building permits.

8) The Scottsdale Water Resources Development Fee places an excessive and disapportionate burden upon new development.

9) The Scottsdale Water Resources Development Fee is excessive on new development.

10) The Scottsdale Water Resources Development Fee discriminates against new development in violation of the requirements of A.R.S. § 9-463.05.

11) The Scottsdale Water Resources Development Fee ordinance fails to meet the statutory requirements of A.R.S. § 9-463.05 and is, therefore, void.

12) The Scottsdale Water Resources Development Fee shall be refunded to the Builders plaintiffs and to all other payors of the fee.

13) The plaintiff shall be awarded its reasonable attorneys' fees and costs.

IT IS ORDERED declaring Ordinance No. 1940 of the City of Scottsdale void. Said defendant shall, within a reasonable time, arrange procedure for orderly refund of all such fees collected, to the payors of such fees who have paid under protest.

IT IS FURTHER ORDERED awarding plaintiff reasonable attorneys' fees to be determined following a proper submission.

ORDINANCE 1940

AN ORDINANCE OF THE CITY OF SCOTTSDALE, MARICOPA COUNTY, ARIZONA, RELATING TO WATER, PROVIDING INITIATION OF WATER SERVICE FROM THE CITY, ESTABLISHING WATER DEVELOPMENT CHARGES FOR SAID SERVICE; AMENDING SECTION 14-134 OF THE SCOTTSDALE REVISED CODE

BE IT ORDAINED by the Council of the City of Scottsdale, Arizona as follows:

Section 1: Section 14-134, of the Scottsdale Revised Code is amended to read:

14-134**Development Fees**

A. There is hereby imposed a fee for the purpose of compensating the city for the costs of water production, and pumping, additional storage and oversized transmission facilities required by developments within the city's water service area, and is assessed in the following amounts:

Dwelling Units

An amount of $635 per dwelling unit.

All Uses Other Than Dwelling Units

Required Meter Size	Fee
5/8"	$ 635
3/4"	1,060
1"	1,585
1-1/2"	3,175
2"	5,080
3"	9,525
4"	15,875
6"	31,750
8"	50,800

B. There is hereby imposed a fee for the purpose of compensating the city for the costs of acquiring, transporting, treating and managing through recharge to and recovery from underground aquifers, new water resources required by development within the city's water service area, and is assess in the following amounts:

Type of Use	Fee
Single Family Dwelling Units	$1,000 per dwelling unit
Multi Family Dwelling Units	$600 per dwelling unit
All Other Uses	$2,000 per acre foot of estimated annual use required in addition to the present annual use.

C. The developer shall pay to the city all development fees at the time and as a condition of the issuance of a building permit, or if the development does snot require a building permit, all fees shall be paid prior to and as a condition of connection to the city's water system.

D. All monies received from water development fees shall be deposited in the utility revenue fund to be used only for capital expansion or enlargement of the City water system.

PASSED AND ADOPTED by the Council of the City of Scottsdale this 15th day of June, 1987.

_____

Herbert R. Drinkwater,
Mayor

ATTEST:

Roy R. Pederson, City Clerk

By _____
Deputy City Clerk

APPROVED AS TO FORM:

_____

William E. Farrell,
City Attorney

Supreme Court, U.S.
FILED
MAY 22 1997
CLERK

No. 96-1718

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HOMEBUILDERS ASSOCIATION OF CENTRAL ARIZONA, a Non-Profit Arizona Corporation; and MARLBOROUGH DEVELOPMENT CORPORATION, an Arizona Corporation,

Petitioners,

v.

CITY OF SCOTTSDALE, a Municipal Corporation, HERBERT R. DRINKWATER, RENE WENDELL, JAMES D. BRUNER, KATHRYN CAMPANA, MYRON R. DEIBEL, WILLIAM SODERQUIST, and BILL WALTON, Members of the City Council of the City of Scottsdale,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Arizona Supreme Court properly concluded that petitioners' failure to contest the reasonableness of the amount of Scottsdale's Water Resources Development Fee eliminated in this case any question under the Fifth Amendment as to whether that Fee was "roughly proportional" to the burden on the community caused by proposed development.

2. Whether the separation of powers doctrine embodied in the Constitution's creation of three coordinate branches of the federal government has any applicability to the states.

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6 of the Rules of this Court, Respondents disclose that Respondent City of Scottsdale is a municipal corporation without parent or subsidiary companies.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1718

HOMEBUILDERS ASSOCIATION OF CENTRAL ARIZONA, a Non-Profit Arizona Corporation; and MARLBOROUGH DEVELOPMENT CORPORATION, an Arizona Corporation,

Petitioners,

v.

CITY OF SCOTTSDALE, a Municipal Corporation, HERBERT R. DRINKWATER, RENE WENDELL, JAMES D. BRUNER, KATHRYN CAMPANA, MYRON R. DEIBEL, WILLIAM SODERQUIST, and BILL WALTON, Members of the City Council of the City of Scottsdale,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondent City of Scottsdale, Arizona and the members of its City Council (collectively, "Scottsdale") hereby oppose the Petition for a Writ of Certiorari to review the judgment of the Arizona Supreme Court filed in this case.

OPINIONS BELOW

Scottsdale concurs with the Opinions Below statement set forth in the Petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petition's Statement of Constitutional Provisions And Statutes Involved is incomplete in that it omits reference to the following authorities:

The lengthy text of Arizona Revised Statute § 9-463.01 (I) is set forth in the Appendix hereto. (Resp. App. 1a)

Arizona Revised Statute § 9-463.05(B)(2) provides:

> Monies received from development fees assessed pursuant to this section shall be placed in a separate fund and accounted for separately and may only be used for the purposes authorized by this section. Interest earned on monies in the separate fund shall be credited to the fund.

Arizona Revised Statute § 45-561(12) states:

> "Safe-yield" means a groundwater management goal which attempts to achieve and thereafter maintain a long-term balance between the annual amount of groundwater withdrawn in an active management area and the annual amount of natural and artificial recharge in the active management area.

The lengthy text of Arizona Revised Statute § 45-576 is set forth in the Appendix hereto. (Resp. App. 1a-4a)

STATEMENT OF THE CASE

Petitioners' Statement fails to note that at the time this action arose, Scottsdale was under a mandate by the State of Arizona to acquire new water resources by the year 2001, or risk having the State place a moratorium on all future development within Scottsdale's boundaries. (Pet. App. 4-5 & 48) The Groundwater Management Act of 1980, Arizona Revised Statutes ("A.R.S.") §§ 45-401 to

-704 (1987 & Supp. 1997) ("GMA"), requires Scottsdale to reduce its dependence on groundwater by achieving "safe-yield" (Pet. App. 4 and A.R.S. § 45-561(12)), which is a balance between the amount of underground water pumped out of Scottsdale's aquifers and the amount naturally and artificially recharged. *Id.* To achieve safe-yield, the GMA requires Scottsdale to have an "[a]ssured water supply" before approving any new development within its boundaries. (Pet. App. 4-5 & 48 and A.R.S. § 45-576(B)) "Assured water supply" means that sufficient groundwater or surface water and appropriate delivery facilities will be continuously available to satisfy the water needs of all development for 100 years. (Pet. App. 4-5 & 48 and A.R.S. § 45-576(I)) At the time this action arose, Scottsdale was deemed to have an assured water supply until December 31, 2000. (Pet. App. 4-5 & 48 and A.R.S. §§ 45-576(E), (I))[1] Thereafter, the Arizona Director of Water Resources could find that Scottsdale does not have an assured water supply, thereby precluding all new development within Scottsdale's boundaries. (Pet. App. 4-5, 10-11 & 48 and A.R.S. § 45-576(C), (E) & (I))

Following passage of the GMA, Scottsdale conducted a comprehensive study and found that it lacked sufficient water to service development after December 31, 2000. (Pet. App. 5, 8, 10-11, 48-49, 65 & 86) Scottsdale then instituted its Water Resource Development Fee (the "Fee") for the specific purpose of acquiring the water needed to allow future development within Scottsdale's boundaries. *Id.*

It is not true, as stated on page 5 of the Petition, that the costs associated with the purchase of Planet Ranch were used as "*the* basis for the assessment of the fee." (Emphasis added). The italicized language implies that the costs associated with Planet Ranch were the only bases

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[1] The deadline has now been moved up to January 1, 1998. *See* A.R.S. § 45-576(E).

for establishing the amount of the Fee. The costs associated with Planet Ranch were just a few of the many cost factors used to establish the amount of the Fee, some of the others being the estimated cost of constructing Water Factory 21, and the purchase or lease of water rights from various Native American tribes. (Pet. App. 5, 19, 48-49, 67 & 73)

The Petition also incorrectly states, at page 5, that the evidence at trial established that Scottsdale "would not" receive any water from Planet Ranch or any of the other proposals presented at trial for acquiring new water. In fact, the evidence presented was merely that one or more of the various proposals for acquiring new water might not be used if better alternatives subsequently arose. (Pet. App. 8-9, 11-12, 66-67 & 73)

While the Petition accurately notes, on page 5, that the trial court found "that no reasonable relationship existed between the amount of the fee and the burden" justifying its imposition, the trial court's conclusion regarding the lack of any "reasonable relationship" was unsupported by any evidence, and rested entirely upon the court's erroneous legal conclusion that fees collected to fund projects not immediately delivering water are per se unreasonable. (Pet. App. 18-21, 23) As the Arizona Supreme Court clearly held, the reasonableness of the Fee was actually never an issue before the trial court, and petitioners have repeatedly admitted as much throughout these proceedings. *Id.*

Petitioners also erroneously claim (Pet. 7) that the Arizona Supreme Court failed to identify any support for its conclusion that the Fee would be used to acquire new water supplies. In truth, the Arizona court noted that petitioners could be assured the Fee would be used to acquire new water supplies, because A.R.S. § 9-463.05(B)(2) requires development fees to be segregated and used only for the purpose for which they are imposed. (Pet. App. 17)

Finally, the Petition incorrectly states, on page 8, that the Arizona Supreme Court did not explain how "the unproven new water resources equal a beneficial use to payor's property." To the contrary, the Arizona court fully explained how imposition of the Fee would benefit petitioners:

> Developers who pay the fees and thus contribute to the capital needed for water surely will receive a benefit from the city's ability to approve new developments. Without the assurance of a water supply, developers would be unable to develop and market their land.

(Pet. App. 10-11)

REASONS FOR NOT GRANTING THE PETITION

Petitioners, a group of real estate developers, go to great lengths to manufacture federal questions where none is presented by the actual holding of the Arizona Supreme Court. In urging this Court to decide whether the "rough proportionality" standard announced by this Court in *Dolan* v. *City of Tigard*, 512 U.S. 374, 375 (1994), should apply in this case, petitioners simply ignore the alternative holding below that they never challenged whether Scottsdale's Fee was roughly proportional to the burdens justifying its imposition. Thus, the question of the applicability of the *Dolan* standard is of purely academic interest. Plainly, the Court should wait until a case comes along where the applicability of *Dolan*'s "rough proportionality" standard actually would affect the proper outcome of the case.

Petitioners' other question involving "separation of powers" obviously does not involve a question of federal law. There is nothing in the Constitution that dictates the proper relationship among the coordinate branches of government as they operate within any particular state. Indeed, the Tenth Amendment arguably protects the states from any federal judicial interference into the division of authority within state government. In any event, the question certainly does not warrant review by this Court.

I. REVIEW OF THIS CASE WOULD RESULT IN AN ADVISORY OPINION.

The Arizona Supreme Court's opinion is devoted almost exclusively to analyzing questions of state law in connection with the validity of Scottsdale's Water Resources Development Fee. This is scarcely surprising because petitioners never raised any federal questions in the proceedings below. Instead, the Arizona Supreme Court, *sua sponte*, raised the issue of the relevance of *Dolan* in this case. It also concluded, however, that the "rough proportionality" issue was not presented because petitioners never challenged the overall reasonableness of the Fee. As the court below plainly held: "In light of our holding that the reasonableness of the amount of the Scottsdale fee was not raised in the trial court, whether that fee is roughly proportional to the burden imposed on the community was likewise not in question." (Pet. App. 21)

Not only is this holding, which is completely case-specific, inherently unworthy of certiorari, but incredibly, petitioners do not even address the fact that they conceded the reasonableness of the Fee. Instead, they leapfrog this concession and challenge the Court's alternative discussion concerning whether the *Dolan* standard applies in a case such as this one, which involves a facial challenge to a generally applicable, legislatively imposed fee program as opposed to an individually-targeted, adjudicatively imposed dedication of private property.

Moreover, the Arizona court's discussion of *Dolan* is hardly definitive. While it did conclude that *Dolan* does not apply in the instant case, it did not hold that the "rough proportionality" standard might not apply in other development fee cases. Instead, the Arizona court merely observed that "there may be good reason to distinguish the *Dolan* adjudicative decision from the Scottsdale legislative one." (Pet. App. 22) Whatever the merit of the Arizona court's passing observation, it plainly provides no basis for this Court to review the decision below.

II. THIS COURT LACKS JURISDICTION TO DETERMINE WHETHER THE ARIZONA COURT VIOLATED FEDERAL SEPARATION OF POWERS PRINCIPLES.

Petitioners' remaining issue is frivolous. They complain that the Arizona Supreme Court's interpretation of the relevant state laws so departs from the intent of the legislature that the holding "amounts to nothing more than judicial policy making . . . ." (Pet. 15) Petitioners then assert that this "violates the constitutional separation of powers doctrine." Not surprisingly, petitioners cite no case in support of this proposition. This is because it is well established that separation of powers is a doctrine embodied in the Constitution only to regulate the coordinate branches of the federal government.

This Court long ago rejected any suggestion that the federal doctrine of separation of powers has any applicability to the States.[2] See, *e.g.*, *Whalen* v. *United States*, 445 U.S. 684, 689 n.4 (1980); *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957). As the Court said in *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902):

> Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking,

[2] It is unclear whether petitioners are also claiming that the Arizona court's construction of Arizona statutes violates separation of powers principles established by Arizona law. This Court lacks authority to determine whether the Arizona Supreme Court has violated these provisions, since that issue is purely one of state law. *See, e.g., Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937) (so far as the objection to the exercise of power is founded on state law, it is answered by a decision of the highest court of the state); *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902) (this Court lacks authority to determine whether a local statute violates separation of powers provision in state constitution).

> pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry. . . .

In sum, there is no basis to challenge in this Court the state supreme court's decision on separation of powers grounds. Indeed, the decision below contains no independent holding on any question of federal law that would justify certiorari. Accordingly, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Arizona Revised Statute § 9-463.01(I) states:

> If the subdivision is comprised of subdivided lands, as defined in § 32-2101, and is within a groundwater active management area, as defined in § 45-402, the preliminary plat shall not be approved unless it is accompanied by a certificate of assured water supply issued by the director of water resources, or unless the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an assured water supply by the director of water resources pursuant to § 45-576 or is exempt from the requirement pursuant to § 45-576. The legislative body of the municipality shall note on the face of the preliminary plat that a certificate of assured water supply has been submitted with the plat or that the subdivider has obtained a written commitment of water service for the proposed subdivision from a city, town or private water company designated as having an assured water supply, pursuant to § 45-576 or is exempt from the requirement pursuant to § 45-576.

Arizona Revised Statute § 45-576 states:

> A. A person who proposes to offer subdivided lands, as defined in § 32-2101, for sale or lease in an active management area shall apply for and obtain a certificate of assured water supply from the director prior to presenting the plat for approval to the city, town or county in which the land is located, where such is required, and prior to filing with the state real estate commissioner a notice of intention to offer such lands for sale or lease, pursuant to § 32-2181, unless the subdivider has obtained a written commitment of water service for the subdivision

from a city, town or private water company designated as having an assured water supply pursuant to this section.

B. A city, town or county may approve a subdivision plat only if the subdivider has obtained a certificate of assured water supply from the director or the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an assured water supply pursuant to this section. The city, town or county shall note on the face of the approved plat that a certificate of assured water supply has been submitted with the plat or that the subdivider has obtained a written commitment of water service for the proposed subdivision from a city, town or private water company designated as having an assured water supply pursuant to this section.

C. The state real estate commissioner may issue a public report authorizing the sale or lease of subdivided lands only if the subdivider, owner or agent has obtained a certificate of assured water supply from the director or the subdivider has obtained a written commitment of water service for the lands from a city, town or private water company designated as having an assured water supply pursuant to this section.

D. The director shall designate private water companies in active management areas that have an assured water supply. If a city or town acquires a private water company which has contracted for central Arizona project water, the city or town shall assume the private water company's contract for central Arizona project water.

E. The director shall designate cities and towns in active management areas where an assured water

supply exists. If a city or town has entered into a contract for central Arizona project water, the city or town is deemed to continue to have an assured water supply until December 31, 1997. Commencing on January 1, 1998, the determination that the city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply.

F. The director shall notify the mayors of all cities and towns in active management areas and the chairmen of the boards of supervisors of counties in which active management areas are located of the cities, towns and private water companies designated as having as assured water supply and any modification of that designation within thirty days of the designation or modification. Persons proposing to offer subdivided lands served by those designated cities, towns and private water companies for sale or lease are exempt from applying for and obtaining a certificate of assured water supply.

G. This section does not apply in the case of the sale of lands for developments which are subject to a mineral extraction and processing permit or an industrial use permit pursuant to §§ 45-514 and 45-515.

H. The director shall adopt rules to carry out the purposes of this section no later than January 1, 1995.

I. For purposes of this section, "assured water supply" means all of the following:

1. Sufficient groundwater, surface water or effluent of adequate quality will be continuously available to satisfy the water needs of the proposed use for at least one hundred years. Beginning January 1 of the calendar year following the year in which a

groundwater replenishment district is required to submit its preliminary plan pursuant to § 45-576.02, subsection A, paragraph 1, with respect to an applicant that is a member of the district, "sufficient groundwater" for purposes of this paragraph means that the proposed groundwater withdrawals that the applicant will cause over a period of one hundred years will be of adequate quality and will not exceed, in combination with other withdrawals from land in the replenishment district, a depth to water of one thousand feet or the depth of the bottom of the aquifer, whichever is less. In determining depth to water for the purposes of this paragraph, the director shall consider the combination of:

(a) the existing rate of decline.

(b) The proposed withdrawals.

(c) The expected water requirements of all recorded lots that are not yet served water and that are located in the service area of a municipal provider.

2. The projected groundwater use is consistent with the management plan and achievement of the management goal for the active management area.

3. The financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage facilities or treatment works. The director may accept evidence of the construction assurances required by § 9-463.01, 11-806.01 or 32-2181 to satisfy this requirement.

Supreme Court, U.S.
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MAY 27 1997
CLERK

(3)

No. 96-1718

In The
Supreme Court of the United States
October Term, 1996

HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, et al.,
Petitioners,

vs.

CITY OF SCOTTSDALE, et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 27, 1997

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's holding in *Dolan v. City of Tigard* applies to permit exactions that are legislatively mandated?

2. Whether the *Dolan* "rough proportionality" test also applies to exactions of all forms of property or only to land?

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Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae* submits this brief in support of Petitioner.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause worthless. Defenders' mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and other individual rights and responsibilities.

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[1]No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* (its members or counsel) contributed financially to the preparation of this brief.

STATEMENT OF THE CASE

This case involves the imposition of a "water resources development fee" on all new development within the city of Scottsdale, Arizona. This fee has been imposed upon developers without any showing by the city of Scottsdale (Respondent) that the amount of the fee is necessary in any way to offset any public burden generated by the proposed development, or that the applicants for development permits will receive any benefit from projects to be funded by this fee.

The reason proffered by Respondent for the fee exaction is based on the Arizona Groundwater Management Act of 1980, Ariz. Rev. Stat. §§ 45-401 to 704 (1987 & Supp.), which requires municipalities to reduce their dependence on groundwater by achieving "safe yield" - a balance between the amount of underground water pumped out of the aquifers and the amount naturally and artificially recharged. Under this statute, the Respondent must demonstrate to the state Director of Water Resources by January 1, 1998 that it has sufficient water supplies to meet its developing needs for the next 100 years.

In order to comply with the Groundwater Management Act, the city undertook a detailed study of its water resources. This study concluded that Scottsdale lacks sufficient water for the future. *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 994 (Ariz. 1997). It also found that Scottsdale would need to raise capital to acquire new supplies of surface water and to construct a system to transport that water. Accordingly, the city began to take various steps to acquire properties needed to produce this additional water supply, including the purchase of Planet Ranch, which has surface water rights. *Id.*

However, without any showing whatsoever that new developments would cause a unique or undue burden on the city's water supply, but rather simply as a means of raising additional money, the plan also proposed to exact a development fee from new development applicants (both residential and commercial) in exchange for building approval. The city council adopted Ordinance No. 1940, imposing a fee of $1,000 per single family residence, $600 per apartment unit and $2,000 per acre foot of estimated water consumption for other new uses. *Id.* at 995. In short, the fees were exactions

unilaterally imposed as a condition on the approval of new developments.

Petitioner, Home Builders Association of Central Arizona (HBA), some of whose members paid the fee under protest, challenged this new exaction in a state court action filed in 1987. In 1991, the trial court held that the fee exaction was invalid under Arizona's Enabling Act because any benefit to the developers who were assessed the fee was too remote in time and speculative in nature to satisfy the proportionality requirement of the Enabling Act. The trial court also found, based on testimony at trial, that it is unlikely the new development upon which the fee is imposed will benefit, directly or indirectly from the projects funded by the fee because these projects, including the Planet Ranch, would likely never produce a water supply for the city of Scottsdale.

The Arizona Court of Appeals reversed this ruling and remanded to the trial court for a determination of the reasonable relationship between the fee and the impact of potential new development. Upon appeal of the Court of Appeals' remand order, the Arizona Supreme Court remanded the case back to the Court of Appeals for reconsideration in

light of this Court's opinion in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Upon reconsideration, the Court of Appeals determined that *Dolan* did not apply to the present case, since the water resources development fee was legislatively enacted. The Arizona Supreme Court affirmed the opinion of the Court of Appeals on substantially the same grounds, but also held that this case could be distinguished from *Dolan* on the theory that development fees are a more "benign" form of regulation than the dedication requirement at issue in *Dolan*. *Home Builders Ass'n*, 930 P.2d at 1000.

SUMMARY OF ARGUMENT

This Court has held that permit exactions of private property must be "roughly proportional" to the burden placed upon the public by the development of that property. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The property owner in *Dolan* challenged the city's requirement for the dedication of a floodplain easement and land for a public bikepath in return for a permit to expand the landowner's plumbing supply store. This Court explained that the "rough proportionality" test requires that the government make an individualized

determination that the required condition is related both in nature and extent to the impact of the proposed development. *Id.* at 391. There was nothing in this Court's holding in Dolan indicating that the exaction rule applied only to property in the form of land.[2]

This Court has on numerous occasions held that other forms of property are entitled to the same degree of constitutional protection as that afforded to real property. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40, 44 (1960)(materialmen's liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596, 602 (1935)(real estate liens); and *Lynch v. United States*, 292 U.S. 571, 579 (1934) (insurance policies). In fact, this Court has held that money, specifically in the form of interest accruing on an interpleader fund deposited in the registry of a county court, was a property interest protected against uncompensated takings under the Fifth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *See also Jacobs v.*

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[2]Indeed, the reasoning of *Dolan* has been applied to situations involving development fees in several state court cases. *See, e.g., Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996); *Northern Ill. Home Builders v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995).

United States, 290 U.S. 13 (1933)(holding that just compensation for physical taking includes interest). This Court should accept review of this case in order to clarify the holding of *Dolan* regarding forms of property other than realty.

Review of this case is also important to clarify whether there is a constitutional distinction between exactions legislatively or adjudicatively imposed. Some state courts have refused to apply the *Dolan* test to exactions imposed by legislative action. *See Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). These courts have interpreted *Dolan* to mean that the rough proportionality analysis only applies to cases where the development fee is adjudicatively imposed through the permitting process, rather than generally applied through legislative action. Other state courts, however, have held that the origin of an exaction is not relevant to the analysis of whether *Dolan* applies, but have focused instead on the character of the exaction itself. *See Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. App. 1994). Indeed, the latter view was emphasized in the dissenting opinion of this Court's denial of *certiorari* in *Parking Association of Georgia, Inc. v.*

City of Atlanta, 115 S. Ct. 2268 (1995). The split of authority among the states calls out for a clarification from this Court on this issue. Accordingly, and because of the wide application and the millions of property owners all across America who daily face governments which demand private property in exchange for the ability to use their land, *amicus curiae* strongly urges this Court to grant the requested petition.

REASONS FOR GRANTING THE PETITION

I. THERE IS ENORMOUS CONFUSION AMONG LOWER COURTS WHETHER THIS COURT'S HOLDING IN *DOLAN V. CITY OF TIGARD* APPLIES TO "LEGISLATIVE" EXACTIONS.

In *Dolan v. City of Tigard*, 512 U.S. 374, 384-385 (1994), this Court distinguished prior cases (*Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)) that had upheld land use regulations as constitutional stating that:

> The sort of land use regulations discussed in the cases just cited, however, differ in two[3]

[3]The second distinction discussed by the *Dolan* Court -- whether the conditions were simply a limitation on the use of the property or instead

> relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.

Id. The *Dolan* Court does not explain the constitutional significance of the adjudicative requirement for the Fifth Amendment to bar uncompensated adjudicatory exactions but not legislative exactions. Nor does it cite any case to further shed light on this inexplicable distinction mentioned but nowhere discussed in the opinion.

As a result, lower courts are understandably confused as how to interpret this apparently significant difference between the two types of exactions. *See, e.g., Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. App. 1994) (rejected argument that legislative exactions not subject to *Nollan/Dolan* test); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. App. 1994)(holding that character of government regulation, not whether legislative or adjudicative, determines whether *Dolan* applies); *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994)(held that *Dolan* applies only to

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required an outright public dedication of property -- does not pertain to this discussion.

adjudicative acts); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. App. 1996)(held that *Dolan* not applicable to citywide legislative-land use regulation). This Court recently fanned the flames of this debate in the form of a dissenting opinion by Justice Thomas in the denial of *certiorari* in *Parking Association of Georgia, Inc. v. City of Atlanta*, 115 S. Ct. 2268 (1995). In that dissenting opinion Justice Thomas wrote:

> [i]t is hardly surprising that some courts have applied *Tigard's* rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . .The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 2268-69.

As Justice Thomas has suggested, not only does there not appear to be a sound basis for distinguishing for Fifth Amendment purposes between legislatively and adjudicatively required exactions, neither does there appear to be any practical difference between the two. In reality, many, if not most, exactions are "legislative" in nature if that term is

construed to mean that the exaction has some origin in the legislative process. Indeed, the floodplain and bicycle path dedications required of the landowner in *Dolan* originated in a legislative decision in the form of a city ordinance passed by the Tigard City Council mandating that developers dedicate land for these purposes. *Dolan v. City of Tigard*, 512 U.S. 374, 377-79 (1994).

Moreover, the challenged exaction in *Dolan* that was struck down as unconstitutional has a remarkably similar genesis as does the exaction at issue in this case. In *Dolan*, the state of Oregon enacted a comprehensive land use management program in 1973. Or. Rev. Stat. §§ 197. 005-197.860 (1991). The statute required all Oregon cities to adopt new comprehensive land use plans that were consistent with the statewide planning goals. Or. Rev. Stat. §§ 197.175 (1), 197.250. Pursuant to these state requirements, the city of Tigard developed a comprehensive plan and codified it in its Community Development Code. The exaction of Florence Dolan's property was due to application of this city land use plan. *Dolan*, 512 U.S. at 379-80.

In the instant case, the state of Arizona passed legislation in 1980 regulating municipalities' use of groundwater ("the Groundwater Code"). Ariz. Rev. Stat. §§ 45-401 to 704. Under the Groundwater Code, municipalities are required to assure that new development will have sufficient water supply to satisfy their needs for 100 years. Ariz. Rev. Stat. § 45-576(L). In order to satisfy the requirements of the Groundwater Code, Respondent formulated a "water resources plan" in 1985 that included the purchase of several potential new sources of water for the Respondent's future needs. In 1987, Respondent passed Ordinance No. 1940, which established the "water resources development fee" at issue in this case in order to fund these new sources of water. Property owners are required to pay this fee before they may obtain a development permit.

In both *Dolan* and the instant case, it is this "leveraging" of the permitting authority by the government that creates the danger of governments using its power to "extort" private property it wants for legitimate public objectives from individual landowners who are being forced to bear alone the cost of achieving that public good. The

nature of exactions and unequal bargaining power between the government and the individual singled out to bear that public burden is what creates the need for heightened scrutiny -- not whether or not the exaction flows from a legislative or adjudicative process.

Despite the lack of a sound basis in fact or theory, the distinction between legislative and adjudicative exactions has begun to grow roots. In affirming the decision of the Arizona Court of Appeals upholding Respondent's fee exaction on all new development, the court below held that the *Dolan* analysis was inapplicable "[b]ecause the Scottsdale case involves a generally applicable *legislative* decision by the city[.]" *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997)(emphasis in original).

As justification for its position, the court below cited the California Supreme Court's decision in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996). In *Ehrlich*, the landowner sought city approval to redevelop an economically unsuccessful private tennis club into a 30-unit condominium complex. *Id.* at 434. Despite the fact that the tennis club was a private, members-

only facility, the city was concerned that its conversion into a housing complex would leave city residents without adequate recreational facilities. *Id.* Accordingly, the city conditioned the granting of a development permit to construct the condominium complex on the payment of a fee for the replacement cost for the "lost" recreational facilities, as well as a fee to fund the city's "art in public places" program. *Id.* at 435. The California Supreme Court, on remand from this Court in light of the issuance of the opinion in *Dolan*, held by a plurality that the recreational impact fee did not satisfy the *Nollan* "essential nexus" and *Dolan* "rough proportionality" tests, but that the imposition a of fee exaction for the arts program did pass constitutional muster because the arts fee was more accurately characterized as a legislatively enactment of general application, since it applied to all development applications within the city. *Id.* at 450.

Thus, review by this Court is warranted on this critically important issue in Fifth Amendment jurisprudence in order to clarify whether there should be a distinction between exactions imposed legislatively or adjudicatively and if so, on what constitutional basis.

II. THIS CASE RAISES AN IMPORTANT CONSTITUTIONAL ISSUE REGARDING WHETHER THE HOLDING IN *DOLAN V. CITY OF TIGARD* APPLIES TO EXACTIONS OF MONEY.

The court below also upheld the constitutionality of the fee exaction on the ground that: "[h]ere, Scottsdale seeks to impose a fee, a considerably more benign form of regulation" than the dedication of land required of Mrs. Dolan. *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997)(*citing Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991)). In so holding, the court below failed to consider both the rationale of the *Dolan* holding as well as a significant line of cases that hold that development fees are subject to the *Dolan* rough proportionality analysis.

For example, in *Commercial Builders*, 941 F.2d at 872, decided before this Court's decision in *Dolan*, the United States Court of Appeals for the Ninth Circuit decided the question of whether Sacramento's imposition of an impact fee for non-residential development constituted a taking without just compensation. Although no unconstitutional taking was found as a result of the fee requirement, the Ninth Circuit applied both the *Nollan* essential nexus test and the reasonable

relationship test, later adopted by this Court as a model for the *Dolan* rough proportionality test, in considering whether the fee exaction violated the Just Compensation Clause. *Commercial Builders*, 941 P.2d at 876. The fact that the *Commercial Builders* court applied the reasonable relationship test to a situation involving impact fees negates the court below's conclusion that such fees are not subject to the heightened scrutiny required in *Dolan*.

Similarly, other courts have held that the *Dolan* analysis is applicable to fee exactions. *See, e.g., Trimen Dev. Co. v. King County*, 877 P.2d 187 (Wash. 1994)(holding that *Dolan* analysis applicable to fee in lieu of dedication), *Northern Ill. Home Builders v. County of Du Page*, 649 N.E. 2d 384 (Ill. 1995)(applying state version of *Dolan* analysis to impact fees), *National Ass'n of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (E.D. Va. 1995)(holding *Dolan* applicable to requirement for cash proffer in return for permit approval).

Moreover, there is no reasonable distinction between impact fees and other forms of exactions. Although the court below characterizes the impact fee as a "more benign" form of

exaction than dedication of property, in either case a landowner is required to trade off something of value or existing rights in exchange for permission to develop his land. Whether the trade-off consists of money or real property is simply a distinction without a difference. In either case, the government has the landowner "over a barrel" with regard to the landowner's right to make beneficial and productive use of his property--a right guaranteed under the United States Constitution:

> In *Nollan*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right --here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)(citations omitted).

The California Supreme Court, in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied,* 117 S.

Ct. 299 (1996) has also rejected the notion of discriminating between various kinds of exactions:

> Under this view of the constitutional role of the consolidated "essential nexus" and "rough proportionality" tests, it matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction.

Id. at 444.

Moreover, other decisions of this Court also reveal no difference between real property and other forms of property, including money. This Court has on numerous occasions held that personal property was entitled to protection against uncompensated takings. Both *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) demonstrate this Court's willingness to protect personal property. In *Ruckelshaus*, this Court adopted a definition of property that includes a wide range of business interests:

> [The] perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labor and invention'.

Ruckelshaus, 467 U.S. at 1003, *quoting* 2 William Blackstone, Commentaries *405. In *Ruckelshaus*, this Court held that Monsanto has a property interest in its business secrets that those business secrets and were protected by the Just Compensation Clause.

In the leading case of *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court was called upon to determine whether interest accruing on an interpleader fund deposited in the registry of a county was a property interest protected against uncompensated takings under the Fifth Amendment. This Court held that it was and in so doing set forth a definition of property that includes monetary interests and reflects the original conception of the reach of the Just Compensation Clause.

In the instant case, individual developers are being forced to pay a substantial fee in order to develop their property. At trial, the evidence indicated that the Respondent has made no particularized finding both generally about all new development and obviously specifically as to any single development proposed and its impact on the city's water supply. Pet. App. at 88. Rather, the fees are primarily

designed to assist Respondent in complying with the requirements of a state statute, the Groundwater Management Act of 1980, a law applying to the general use of municipal groundwater and itself not applicable specifically to new development.

Thus, developers, a small group of individuals dependant on the discretionary permitting power of the city, are being required to subsidize a citywide acquisition of new water resources at the threat of being denied the right to make beneficial and productive use of their properties. This is exactly the situation, municipalities using permitting power to exact constitutional rights from landowners, that this Court held unconstitutional in *Dolan*. Accordingly, *amicus curiae* strongly urges this Court to grant the requested petition for review or summarily reverse the decision below.

CONCLUSION

The area of takings jurisprudence continues to be a source of enormous confusion for lower courts. Hence, where there are discrete issues of constitutional concern that could be readily resolved through guidance by this Court, review is warranted. The instant case presents two such

issues for review. Therefore, and for all the above stated reasons, *amicus curiae* strongly urges this Court to grant the Petition for Writ of *certiorari.*

Respectfully submitted,

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May 27, 1997

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No. 96-1718

In The

Supreme Court of the United States

October Term, 1996

Homebuilders Association of Central Arizona, a Non-Profit Arizona Corporation; and Marlboro Development Corporation, an Arizona Corporation,

Petitioners

v.

City of Scottsdale, a Municipal Corporation, Herbert R. Drinkwater, Rene Wendell, James D. Bruner, Kathryn Campana, Myron R. Deibel, William Soderquist, and Bill Walton, Members of the City Council of the City of Scottsdale,

Respondents

On Petition For Writ Of Certiorari To The Supreme Court of Arizona

PETITIONERS' REPLY MEMORANDUM

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June 13, 1997

4 pp

Memorandum

In their Brief in Opposition, Respondents include additional information under the Statement of the Case. (Respondents' Brief, p. 2-3). This information relates to certain details of the Arizona Groundwater Management Act. However, the requirements of the Arizona Groundwater Management Act and Scottsdale's decision to pursue acquisition of new water resources remain unchallenged and are not at issue in this action. At issue is whether there was a sufficient showing of the required connection between Scottsdale's development fee and the beneficial use accruing to the fee payors.

Respondents also attempt to demonstrate that the Arizona Supreme Court has explained how imposition of the development fee benefits fee payors. (Respondents' Brief, p. 5). Respondents quote that portion of the opinion indicating:

> Developers who pay the fees and thus contribute to the capital needed for water surely will receive a benefit from the city's ability to approve new developments. Without the assurance of a water supply, developers would be unable to develop and market their land. (Pet. App. 10-11).

The above holding is seriously deficient in at least two major respects. First, the holding addresses some generalized benefit to a developer and completely ignores the standard required in this case, a beneficial use to the development. Second, the holding rests on the notion that ability to develop and market land is in itself a benefit generated when a permit (a discretionary governmental benefit) is issued. This reasoning is circular and illogical.

The Respondents also argue that the applicability of the *Dolan* standard is of purely academic interest in this case. Respondents' argument is based on the Arizona Supreme Court's holding that reasonableness of the amount of the Scottsdale fee was not raised in the trial court and that whether that fee was roughly proportional to the burden imposed on the community was likewise not in question. (Pet. App. 21).

Respondents' argument, like the opinion of the Arizona Supreme Court before it, significantly misstates the conduct of proceedings below and the issue presented. The reasonableness inquiry referenced by the Respondents and contained in the Arizona Development Fee Statute relates to reasonableness of the amount of the fee. The opinion of the Arizona Supreme Court improperly characterizes this issue as "the overall reasonableness" of the fee. From that erroneous characterization, the court compounded its error by concluding that because of the amount of the fee was not at issue there was no occasion to apply the *Dolan* test is this case. The court's reasoning and Respondents' argument both suffer from the baseless assumption that constitutional inquiry is limited to whether the amount of the fee is roughly proportional to the city's economic burden in providing public services.

This argument ignores the breath of the inquiry historically applied by state courts and by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Dolan*, the question presented was whether the city's findings were constitutionally sufficient to justify the conditions imposed on issuance of the building permit. This Court's analysis centered around whether the permit conditions bore the required relationship to the projected impact of the development. This Court held: "[A] use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government

purpose." *Id.* at 388, (quoting *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 127 (1978)).

Respondents' argument ignores the fact that this Court has specifically held that a proper inquiry rests on a determination of whether the required dedication is related both in nature and extent to the impact of the proposed development. Respondents' argument ignores the substantive half of the inquiry and would relegate the rough proportionality test to a mere review of the mathematical calculations used to determine the amount of a development fee. This issue is clearly of minor constitutional significance when compared to the benefit issue erroneously decided by the Arizona Supreme Court in this matter.

Respectfully submitted,

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